82-1141

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMON CAUSE, *et al.*,
Appellants,

v.

WILLIAM F. BOLGER, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

ARCHIBALD COX *
ELLEN G. BLOCK
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200
Attorneys for Appellants
* *Counsel of Record*

January 7, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Congressional Franking Act of 1973, as amended, 39 U.S.C. § 3210, which grants incumbent Senators and Congressmen seeking reelection, but not their opponents, the substantial financial advantage of free use of the mails "to promote incumbents' reelection efforts," * violates plaintiffs' rights to fair election contests in violation of the First and Fifth Amendments.**

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* Opinion below, App. 14a.

** In addition to the parties named in the caption, the other parties to the proceeding below were John W. Gardner, a plaintiff-appellant, Donald T. Regan, a defendant-appellee, and the House Commission on Congressional Mailing Standards, an intervening defendant-appellee.

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JURISDICTIONAL STATEMENT

Appellants Common Cause and John W. Gardner (plaintiffs below) appeal from the order entered by the United States District Court for the District of Columbia on September 8, 1982 that granted summary judgment for appellees (defendants and intervening defendant below) on the ground that 39 U.S.C. § 3210 violates neither the First nor the Fifth Amendment.

OPINION BELOW

The opinion of the district court, which is not yet officially reported, appears as Appendix A to the Jurisdictional Statement.[1]

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[1] Citations to pages of the Appendices to this Jurisdictional Statement are given as "App. ——."

JURISDICTION

The amended complaint filed on October 5, 1973 challenged the constitutionality of the Congressional Franking Act of 1973, 39 U.S.C. § 3210, under the First and Fifth Amendments and the General Welfare Clause of the United States Constitution. The jurisdiction of the district court was based upon 28 U.S.C. § 1331. The case was heard and decided by a court of three judges under 28 U.S.C. § 2284.[2] The order granting appellees' motions for summary judgment and dismissing the case was entered on September 8, 1982.[3]

Appellants filed a timely notice of appeal on November 8, 1982. (Appendix D, App. 54a). This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

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[2] Public Law 94-381, 90 Stat. 1119 (1976), which removed "substantial constitutional questions" from the class of cases to be heard by three judge district courts, does not apply to actions commenced before the date of its enactment, August 12, 1976.

[3] The district court's opinion and order were signed on September 2 and filed with the clerk on September 7. Entry of the order was not effected until September 8, making the latter date the benchmark for scheduling this appeal.

Appendix E (App. 55a) sets forth the Congressional Franking Act of 1973, Public Law 93-191, 39 U.S.C. § 3210, as amended in October 1981 by Public Law 97-69.

STATEMENT

Plaintiffs, Common Cause and John W. Gardner, commenced this action on October 5, 1973, seeking injunctive and declaratory protection against the defendants' violation of the rights of its member-candidates and member-voters to fair elections to the U.S. Senate and House of Representatives. At that time the violations consisted of the defendants' carriage of a large volume of franked mail sent by Senators and Representatives seeking reelection not "on official business" as required by the statute then in force, 28 Stat. 593, 622, but for the purpose of advancing their own candidacies. A few months later Congress revised the applicable law by enacting the Congressional Franking Act of 1973, 39 U.S.C. § 3210 (1980) (Appendix E, App. 55a). This Act, as recently amended, is the focus of this proceeding.

Upon enactment of the present law plaintiffs amended their complaint to allege that its implementation by defendants would violate their constitutional rights to fair congressional elections, in violation of the First and Fifth Amendments, by giving large and important government assistance to incumbent candidates, but not to their challengers, in the form of free government carriage of mailings designed to promote the reelection of incumbent Senators and Representatives. A three-judge district court was then convened pursuant to 28 U.S.C. § 2284.[4] That court twice denied motions to dismiss for lack of standing. (Appendices B and C, App. 30a and 49a). After extensive discovery long delayed by witnesses' resistance, cross-motions were filed for summary judgment. The three-judge court then made findings of fact, granted

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[4] *See supra* note 2.

defendants' motions and dismissed the complaint. (Appendix A, App. 1a)

The findings of fact detail the intentional use of franked mailings with the purpose and effect of promoting the incumbent Senator's or Representative's political campaign. "Members often include self-laudatory material in franked mailings, including favorable editorials, reports of awards, compliments of others concerning the member's performance of his duties, pressure group ratings, and the like" (App. 13a). "The 'usual and customary congressional questionnaires,' frankable under section 3210(a)(3)(c)" were found often to be "used for purposes other than merely determining constituents' views on particular issues," such as "identifying recipients for targeted mailings, thus facilitating the member's political 'responsiveness' to various groups and interests" (App. 13a). Targeted mass mailings have been used in ways which the district court found "frequently have no relationship to official business and which are closely connected to reelection plans and strategy" (App. 13a). "It is an undeniable conclusion that the fluctuations in the volume of franked mass mailings are caused by the electoral cycle, rather than by fluctuations in legislative activity." (App. 14a).

The court below not only concluded that the "volume and timing of franked mass mailings . . . indicate widespread use to promote incumbents' reelection efforts" (App. 14a). The court also found that the "House Commission on Congressional Mailing Standards has specifically approved the uses of the franking privilege described above" (App. 13a-14a), and that similar mailings were registered with the Secretary of the Senate (App. 14a). The essentially-political uses of the frank cannot be ascribed simply to the incidental campaign benefits, such as name recognition, inherent in a Senator's or Representative's public performance of his duties. The district court also found that Members of Congress and

their staffs, with the encouragement of Democratic and Republican campaign committees, have received and used professional political advice "to help integrate franked mailings into the overall campaign strategy" (App. 12a-13a).

The district court further concluded (App. 14a)—

> Measured in financial terms, the franking privilege confers a substantial advantage to incumbent Congressional candidates over their challengers. We find that Congress recognized the potential financial benefits conferred by section 3210 on campaigning incumbents at the time it passed the Act.

Despite these findings of fact the district court gave judgment for defendants. Explicitly denying strict scrutiny and applying the rational basis test (App. 22a), the district court noted that many franked mailings serve in varying degree the dual purposes of official communication and electoral campaigning (App. 23a). Then, in seeming disregard of its own finding that "Congress recognized the potential financial benefits conferred by Section 3210 on campaigning incumbents at the time it passed the Act" (App. 14a), the district court concluded (App. 23a)—

> Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection. The details of the franking scheme . . . appear to be rationally designed to work for that end.

THE QUESTION IS SUBSTANTIAL

The question presented by this appeal is important because it goes to the heart of representative democracy. At isue is the constitutionality of the extensive material assistance that the federal government gives to incumbent Senators and Representatives, but not to opposing candidates, by the free carriage of the incumbents' special political mailings which the district court found "frequently have no relation to official business and which

are closely related to reelection plans and strategy" (App. 13a). The question thus involves the fairness of every congressional election at which an incumbent Senator or Representative is seeking reelection.

The question is also substantial. The decision below is inconsistent with settled constitutional principles. The district court's failure to apply those principles is not justified by the fact that some political mailings may be related in some degree to the incumbent candidate's official duties.

1. The decision below is inconsistent with settled constitutional principles.

The potential candidates and voters represented by the plaintiff Common Cause have a judicially cognizable right to an electoral process uncontaminated by pervasive violation of the First and Fifth Amendments. *Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Schiaffo* v. *Helstoski*, 492 F.2d 413 (3rd Cir. 1974) (abuse of franking privilege); *Hoellen* v. *Annunzio*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973) (abuse of the franking privilege); *Greenberg* v. *Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980) (preferential access to the mails); *Campbell* v. *Arapahoe County School District #6*, 90 F.R.D. 189 (D. Colo. 1981) (government expenditures in opposition to ballot measure). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) the Court allowed such plaintiffs to challenge the constitutionality of the partial public financing of presidential election campaigns under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-13. In preliminary rulings the court below correctly upheld plaintiffs' standing in the instant case. (Appendices B and C, App. 30a and 49a).

It is equally plain that the First and Fifth Amendments bar the government from giving to one candidate in an election substantial, direct material assistance that

it withholds from opponents similarly situated—at least in the absence of some compelling, *neutral* justification. "A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow unfair advantage on one of several competing factions." *Mountain States Legal Foundation* v. *Denver School District #1*, 459 F. Supp. 357, 360 (D. Colo. 1978). *See also Anderson* v. *City of Boston*, 376 Mass. 178, 380 N.E. 2d 628, 637 n.14 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). "Government cannot adopt a policy of granting broadcast licenses only to Republicans and Democrats and denying them to others. . . . Nor could the government require licensees to deny access to persons not affiliated with the 'major' parties or to favor certain views by granting them reduced payments or special discounts." *Greenberg* v. *Bolger*, 497 F. Supp. 756, 777 (E.D.N.Y. 1980) (denial of third-class mailing rate to "new" political parties violates First and Fifth Amendments). In *Buckley* v. *Valeo*, 424 U.S. 1, 98-99 (1976), this Court recognized that an election funding plan that significantly disadvantaged a candidate or party would violate the Fifth Amendment unless the discrimination could survive the most rigid scrutiny. The government's "thumb on the scales" also violates its obligation under the First Amendment not to disturb "equality of status in the field of ideas" but to "afford all points of view an equal opportunity to be heard." *Police Department* v. *Mosley*, 408 U.S. 92, 96 (1972).

The court below gave the First Amendment "little place in our analysis" (App. 19a) and upheld the franking statute upon "invocation of the rational basis test" (App. 22a) because it misread this Court's decisions as reserving heightened scrutiny "for those instances where the restriction impacts *directly* on the *content* of the restricted communication" (App. 17a). The court held (App. 19a):

> The lines drawn by the franking statute distinguish *individuals*, not ideas. And because the individuals affected—non-incumbent congressional candidates—must be presumed to represent the full spectrum of political ideology, we cannot hold that the franking privilege creates any discrimination or restriction which is content related.

Both the factual analysis and the legal premise are erroneous. In fact, the franking statute "creates . . . discrimination" by subsidizing the circulation of one, and only one, set of ideas—the ideas of the incumbent candidate. That discrimination is not lessened by the breadth of the spectrum of competing ideas that his or her opponents pay to circulate. Furthermore, the decisions of this Court make plain that the First Amendment bars discrimination among speakers just as it prohibits discrimination among ideas. In *Police Department* v. *Mosley*, 408 U.S. 92, 96 (1972), after condemning content-based discrimination, the Court observed—

> Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression.

In *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court condemned discrimination against certain charitable organizations even though their administrative structure, rather than the causes espoused, was the basis for the discrimination. In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-86 n.22 (1977), the Court applied the compelling interest test to legislation restricting the political speech of corporations regardless of the ideas expressed. Indeed, since *NAACP* v. *Alabama*, 357 U.S. 449 (1958) the Court has held generally that "significant encroachments" on First Amendment political rights "cannot be justified by a mere showing of some legitimate governmental interest", and "that the subordinating interests of the State must survive exacting scrutiny." *Buckley* v. *Valeo*, 424 U.S. 1,

64 (1976). *Accord: Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Branti* v. *Finkel*, 445 U.S. 507, 515-516 (1980).

It was equally erroneous for the court below to use the rational basis test in applying the equal protection guarantee of the Fifth Amendment. Voting is a fundamental right. "Competition in ideas and governmental policies is at the core of our electoral process and of First Amendment freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968). When government regulation has a "real and appreciable impact" on the electoral rights of one class of candidates, parties, or citizens, that regulation "must be 'closely scrutinized' . . . ." *Bullock* v. *Carter*, 405 U.S. 134, 144 (1971). *See also Williams* v. *Rhodes*, *supra*; *Kramer* v. *Union Free School District*, 395 U.S. 621, 626 (1969); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979). The same strict scrutiny is applicable to laws that afford substantial assistance to one candidate or party in competition with others because "any system that funds only some candidates on the ballot places their competitors at a clear disadvantage . . . ." (*Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1268 (1975).[5]

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[5] This principle has been expressly or implicitly applied in decisions proscribing as unconstitutional various forms of preferential assistance in an election or referendum:

Patronage dismissals: Elrod v. *Burns*, 427 U.S. 347, 356 (1976) ("The free functioning of the electoral process . . . suffers.")

Preferential mailing rates to major parties: Greenberg v. *Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980).

Public funds spent on one side of a referendum: Mountain States Legal Foundation v. *Denver School District #1*, 459 F. Supp. 357, 360 (D. Colo. 1978); *Anderson* v. *City of Boston*, 376 Mass. 178, 380 N.E. 2d 628, 637 n.14 (1978), *appeal dismissed* 439 U.S. 1060 (1979); *Stern* v. *Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S. 2d 235, 239 (Sup. Ct. 1975) ("The spectacle of public agencies campaigning for or against propositions . . . can only demean the democratic

Strict scrutiny is the more important where the classification made by the law-makers operates to preserve their own political power. *Buckley* v. *Valeo*, 519 F.2d 821, 843 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). The differential funding of "new" party candidates under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-13, was sustained only upon a showing that, given the "obvious differences in kind between the needs and potentials" of an established major party and a new or small political organization and the restrictions on private funding tied to receipt of major-party public funds, "the general election funding system does not work an invidious discrimination. . . ." *Buckley* v. *Valeo*, 424 U.S. 1, 97, 99 (1976).

The findings of fact in this case demonstrate conscious and egregious discrimination in favor of incumbents. The district court found that the franking privilege granted to incumbents but denied to challengers is used, and expected to be used, "in ways that frequently have no relationship to official business and which are closely connected to reelection plans and strategy" (App. 13a). The court concluded (App. 14a):

> Measured in financial terms, the franking privilege confers a substantial advantage to incumbent Con-

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process."). *See Stanson* v. *Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697, 726, 551 P. 2d 1, 9 (1976).

Preferred ballot position: Mann v. *Powell*, 398 U.S. 955 (1970) *aff'g* 314 F. Supp. 677 (N.D. Ill. 1969) (preferred position to incumbent); *Sangmeister* v. *Woodward*, 565 F.2d 460 (7th Cir. 1977) (preferred position to one party); *Weisberg* v. *Powell*, 417 F.2d 388 (7th Cir. 1979) (preferred position on primary ballot to designee of party leadership); *Netsch* v. *Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972) (preferred position to incumbent); *Gould* v. *Grubb*, 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 (1975) (preferred position to incumbent); *Kautenburger* v. *Jackson*, 85 Ariz. 128, 333 P.2d 293 (1958) (alphabetical ballot placement).

Ballot designation as incumbent: Rees v. *Layton*, 6 Cal. App. 3d 815, 86 Cal. Rptr. 268 (Dist. Ct. of App. 1970).

> gressional candidates over their challengers. We find that Congress recognized the potential financial benefits conferred by section 3210 on campaigning incumbents at the time it passed the Act.

Contrary to the opinion below (App. 14a), the government's discriminatory support for incumbents and their ideas is not rendered less objectionable by the plaintiffs' inability to prove that the substantial financial advantage that Senators and Representatives have conferred on themselves has actually affected the outcome of specific election campaigns. The constitutional wrong is the government's granting to incumbent candidates a substantial financial subsidy to assist them in prevailing over opposing candidate and voters. This Court has repeatedly struck down laws interfering with access to the ballot or with proper candidate expenditures, without inquiring into whether the complaining candidate would have won the election. *E.g.*, *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Those cases involved direct harm to the complaining candidates and voters. The present case involves a benefit to their opponents. The difference is irrelevant, however, within the closed context of a political election. As the court below recognized in an earlier opinion,[6] direct and substantial financial aid to one of a few candidates necessarily injures his or her opponents.

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[6] In an opinion denying a motion to dismiss for lack of standing the district court ruled (App. 35a-36a):

> [T]he injury involved here occurs regardless of the outcome of any particular election. . . .
>
> This injury is personal to the candidates, substantial in effect, and directly traceable to the operation of the franking statute. In order to neutralize this advantage of incumbency, a challenger must raise substantially greater funds than he otherwise would, or, if he is able, contribute such moneys to his campaign out of his own pocket. . . . The injury is not only directly traceable to the operation of the franking statute, but

Franked mail, like many other activities of a Senator or Representative, may serve two functions: (1) It may give constituents information about the conduct of government and the proceedings in Congress; (2) It may promote a Senator's or Representative's campaign for reelection. Use of government funds for the first purpose serves the public interest. No public interest is served, however, by the use of public moneys for the second function, *i.e.*, to support the political campaign of an incumbent Senator or Representative while withholding support from opposing candidates. The latter use therefore violates the First and Fifth Amendments.

2. The mixture of public and individual political functions served by some franked mail does not justify the district court's departure from settled constitutional principles.

A franked mailing may serve both the function of communicating with constituents about official business and the function of promoting the incumbent's reelection.

Every mailing to constituents has some political impact, if only to increase name recognition. Some franked political mailings "have no relationship to official business" (App. 13a). Others serve to convey some information about the business of Congress as well as to promote the incumbent's candidacy. The degree to which a particular mailing serves the partisan political function as opposed to the "official business" function varies with its content, the number and character of addressees, the timing in relation to the election, and like circumstances.[7] The district court's findings of fact make plain that many mail-

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as plaintiffs have framed this action, the statute itself *is* the injury because of its alleged facial invalidity.

[7] *Hoellen* v. *Annunzio*, 468 F.2d 522, 526 (7th Cir. 1972); *Rising* v. *Brown*, 313 F. Supp. 824, 826-27 (C.D. Cal. 1970).

ings, especially mass mailings by incumbents during the election season, serve only the incumbents' candidacy, and that many others are overwhelmingly political. The district court concluded, however, that the presence of some degree of public purpose merely on the face of mailings authorized by Section 3210 is sufficient to bar adjudication of the unconstitutionality of the "abuses" (App. 21a, 23a).

The reasoning contains its own destruction. Generalized, it would sanction other massive government intervention in support of incumbents' reelection campaigns under the pretense of enabling the incumbents to keep constituents informed about government. The reasoning would sustain legislation requiring broadcast licensees to provide Senators and Representatives with free time, even during the election campaigns, in which to keep in touch with constituents about pending legislation and other congressional activities.

Similarly Congress might appropriate for the use of Senators and Representatives public moneys with which to purchase time for radio and television broadcasts "discuss[ing] . . . proposed or pending legislation or governmental actions and the positions of the Members of Congress on, and arguments for or against, such matters." 39 U.S.C. § 3210(a)(3)(B). Under the reasoning of the district court a claim that each broadcast in some slight way "related to his official duties" (App. 23a) would put beyond constitutional attack an incumbent Congressman's use of the public funds for television broadcasts delivered after a declaration of candidacy and in order to promote his campaign for reelection.

The appropriation of government funds to pay for Senators' and Representatives' essentially political mailings cannot wisely be distinguished from their use to pay for essentially political television broadcasts on the ground that such use of the frank is a traditional political instrument. Even sponsors of the 1973 Act have expressed

shock at the recent massive increases in political use of franked mailings.[8]

The reasoning of the district court also proves too much as applied to the present case. It led to approval of the constitutionality of mailings that serve no public purpose. This category includes the mailing of self-laudatory material such as "favorable editorials, reports of awards, compliments of others concerning the Member's performance of his duties, [and] pressure group ratings . . . ." (App. 13a); it also includes a variety of mailings to postal patrons or identified addressees who are not constituents of the Congressman but will be voters in the reconstituted district in which he is a candidate for reelection.[9]

Finally, the district court's reasoning proves too much because it sanctions government subsidies for distribution of an incumbent Congressman's campaign materials whenever the face of the materials will support some slight claim that they are "related to official duties;" for example, mass mailings targeted "in ways that frequently have no relationship to official business and which are closely related to reelection plans and strategy" (App. 13a), and questionnaires used not to determine constituents' views on particular issues but to obtain demographic and other information helpful to identifying recipients for targeted mailings (App. 13a).

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[8] Congressman Morris Udall, chief sponsor of the 1973 Act and chairman of the appellee House Commission, has stated:

> These mass mailings can have evil consequences. I frankly don't know how the hell we can define and control the problem. We have virtually no limits on spending now. We thought we had these people nailed down, but they sure have found a lot of loopholes. The present law hasn't worked, and we have to go back and try again.

Quoted in The New York Times Magazine, Nov. 2, 1980 at p. 98, col. 3.

[9] *Cf. Hoellen* v. *Annunzio*, 468 F.2d 522 (7th Cir. 1972).

The governing principle is clear. Relatedness to official business or official duties will not justify government subsidization of an incumbent's mass mailing whose purpose or primary effect, judging by the content in light of the circumstances, is the advancement of the incumbent's campaign for reelection. *Cf. Abingdon School District* v. *Schemp*, 374 U.S. 203, 222 (1963): *Widmar* v. *Vincent*, —— U.S. ——, 102 S.Ct. 269, 275 (1981). The circumstances that will show whether the purpose or primary effect of a mailing is political, in addition to its content, include the size of the mailing; the timing of the mailing in relation to the incumbent's declaration of candidacy or the date of the primary or general election; whether the list of addressees has been compiled for campaign purposes, came from a political party, or was based upon party affiliation; and whether the mailing was targeted in ways bearing no relation to official business.[10]

The district court's dismissal of the complaint upon a record that it said "consists principally of abuses" [11] encourages expansion of those abuses, including targeted mass mailings "that frequently have no relationship to official business and which are closely related to election

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[10] *See supra* note 7.

[11] The district court gave this description as a reason for concluding that it should not intervene to stop abuses of the frank. (App. 23a-24a).

With due respect for the district court we submit that this was singularly inappropriate. Plaintiffs should not be deprived of an adjudication on the merits because of the failure—or inability—of the defendants, the intervenors, or the *amicus curiae* to make a different record, even though given every opportunity. The U.S. Department of Justice represented the original defendants. The House Commission on Congressional Mailing Standards was permitted to intervene as a defendant. The Select Committee on Ethics represented the U.S. Senate as *amicus curiae*.

The court was, of course, entitled to seek additional information before particularizing a remedial decree.

plans and strategy" (App. 13a). The dismissal also invites revival of the earlier even more plainly unconstitutional franked mailings abandoned under pressure of this lawsuit by the revision of the Franking Act in 1973 and 1981.

The framing of a workable judicial decree is less difficult than the district court seems to have supposed. As an initial step the court might simply enter a declaratory judgment that Section 3210 as historically and presently applied violates the First and Fifth Amendments, leaving it to Congress, if Congress so desires, to write new legislation authorizing but limiting the use of the frank to official business. Such initial disposition of the case would be analogous to the handling of litigation involving legislative malapportionment (*Reynolds* v. *Sims*, 377 U.S. 533, 585-586 (1964)) and vague or overbroad restrictions upon freedom of expression (*United States* v. *Robel*, 389 U.S. 264, 266-68 (1967)). If more coercive relief should prove necessary because the defendants continued their present practices, the court might enjoin, pending new legislation, any use of the frank by an incumbent Senator or Representative who had become a candidate for relection.

Both these forms of decree would leave to Congress the initiative in drafting legislation satisfying constitutional imperatives. The burden would not be excessive for a Congress valuing use of the frank for official communications about congressional and other public business but genuinely concerned about avoiding public subsidies to incumbents' campaigns for reelection.[12] Legislation correcting most abuses might encompass four approaches:

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[12] The district court found that the Congress that enacted Section 3210 recognized the financial benefits that it was conferring upon Senators and Representatives who would be candidates for reelection (App. 14a). Part of the support for this finding was the statement of Representative Wilson, Chairman of the Committee that reported the bill (Hearings before the Special Ad Hoc

First, and most important, Congress might deny use of the frank for mass mailings. A less stringent and therefore less effective measure would withhold the frank from mass mailings by an incumbent who has become a candidate for reelection. Alternatively, Congress might authorize equal use of the frank by opposing candidates.

Second, Congress might bar use of the frank for other mail that serves little or no public purpose but is designed to assist a campaign for reelection, viz—

—questionnaires asking for party affiliation, preferences among presidential candidates, or similar information,

—material laudatory of the Member,

—material conveying congratulations to constituents or reporting on awards or honors won by them,

—unsolicited mailings of baby books, calendars, etc.

Third, the use of the frank could also be denied in the case of mailings to lists of addressees whose identity or selection marks the mailing as political, viz—

—to persons who are currently outside a Congressman's district but who, because of reapportionment, will be eligible to vote in the District,

—to lists created in the course of a political campaign or acquired from a political party,

—to names maintained in a computer file which are accompanied by party designation, political contribution history, election precinct or ward, or any other indicia of likely support in an election.

Fourth, Congress could additionally provide prompt and effective remedies against other less blatant but still un-

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Committee of the House Committee on Post Office and Civil Service on H.R. 3180, 93rd Cong., 1st Sess. 87 (Feb. 20 and 27, 1973)):

> [S]ometimes the poor incumbent is running against a millionaire who could buy the election if we didn't have this opportunity to communicate with our district.

constitutional uses of the frank for campaign purposes. Section 3210(e) makes the "frankability of all mail matter" depend upon the "type and content of the mail", thus rejecting prior judicial decisions holding that whether a particular mailing is "on official business" should be determined in the light of all the circumstances. *Hoellen* v. *Annunzio*, 468 F.2d 522, 526 (7th Cir. 1972); *Rising* v. *Brown*, 313 F. Supp. 824, 826-27 (C.D. Cal. 1970). In our view, as stated above, carriage of a Senator's or a Representative's mailings under the congressional frank is an unconstitutional public subsidy to a political candidate if the purpose or primary effect of the particular mailing, determined in the light of all the circumstances, is to promote his reelection. If Congress were to prescribe such a test for all mailings not barred by express prohibition, and if it were also to provide a truly independent body to hear complaints by opposing candidates, then borderline cases could readily be resolved and constitutional difficulties would be minimized if not eliminated.

We sketch these possible lines of legislative action only to show that judicial invalidation of Section 3210 would not create insoluble legislative difficulties. At this stage of the case no further showing is required. There is no greater need to detail specific solutions here than there is in the case of other facially overbroad interferences with First Amendment liberties (*United States* v. *Robel*, 389 U.S. 264, 266-68 (1967)) or of unconstitutional legislative reapportionment (*Reynolds* v. *Sims*, 377 U.S. 533, 585-86 (1964)).

If this supposition be mistaken and a more specific judicial decree be desirable, we would urge that it could be developed along the lines for possible legislative action sketched above. The single most important provision—a restriction barring the most widespread and egregious abuses—would forbid free government carriage of a Senator's or Representative's mass mailings after he or she

has become a declared candidate for reelection, unless equal access to use of the frank were extended to opponents. Such a prohibition would be analogous to Section 315 of the Federal Communications Act, 47 U.S.C. § 315 (1962), requiring broadcast licensees to provide equal time to all declared candidates for elective office.

These examples of remedial action, while incomplete in detail, are sufficient to show that the problem of separating truly official mail from essentially political mailings is insufficient to support the district court's failure to apply the constitutional principles that have heretofore controlled government interference in the realm of political ideas and contests for election.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted and the case set down for plenary consideration.

Respectfully submitted,

ARCHIBALD COX *
ELLEN G. BLOCK
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200
Attorneys for Appellants
* *Counsel of Record*

January 7, 1983

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

Filed Sept. 7, 1982

MEMORANDUM OPINION

STATEMENT OF THE CASE

By an amended complaint filed March 12, 1974, plaintiffs seek a declaratory judgment that 39 U.S.C. § 3210, granting to Members of Congress the privilege of sending mail through the United States Postal Service as franked mail, is unconstitutional. Plaintiffs claim, in essence, that the franking privilege afforded by the statute provides an unconstitutional "subsidy" to incumbent candidates for Congress because franked mail inevitably has the effect of aiding Members' reelection efforts. Plaintiffs reason that because they are not afforded similar campaign advantages, section 3210 abridges their First Amendment rights to associate freely for the advancement of political beliefs, as well as deprives them of equal protection under the due process clause of the Fifth

Amendment. In addition, plaintiffs seek a judgment that section 3210 permits an unlawful use of public funds for a non-public purpose in violation of the General Welfare Clause of Article I, Section 8, of the Constitution.

The Postmaster General[1] and the Secretary of the Treasury were the original named defendants in this case. Subsequently, on September 8, 1976, the House Commission on Congressional Mailing Standards was permitted to intervene as a defendant and the United States Senate, through its Select Committee on Ethics, formerly the Select Committee on Standards and Conduct of the United States Senate, was allowed to participate as *amicus curiae*.

It is the position of all defendants and the *amicus* that the franking statute and the congressional rules enacted thereunder facilitate the necessary and constitutionally protected communication between Members of Congress and their constituents and draw a proper line between legitimate and illegitimate uses of the frank, *i.e.*, between communications on official business and communications for personal political advantage. They deny that the franking statute violates any of plaintiffs' First or Fifth Amendment rights. The case therefore presents a classic example of the tension which sometimes arises between conflicting claims of rights.

PRIOR PROCEEDINGS

On July 1, 1974, after denying defendants' motion to dismiss, the court granted plaintiffs' motion to convene a statutory court of three judges pursuant to 28 U.S.C. § 2284.[2] This court, in turn, considered and denied defendants' renewed motion to dismiss on February 10,

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[1] Now the Director, United States Postal Service.

[2] Pub. L. No. 94-381, enacted August 12, 1976, which repealed §§ 2281 and 2282 and amended § 2284, does not apply to any actions filed before the date of enactment.

1975. Both motions to dismiss were predicated in part on plaintiffs' alleged lack of standing to bring this action, and were denied. Thereafter, all parties engaged in discovery through interrogatories, documentary requests, depositions and requests for admissions. Because of the nature of much of the material, a protective order was issued on March 1, 1976 and various coding systems were established to protect the confidentiality of Members of Congress and other witnesses. Without detailing the precise nature and volume of the discovery pursued by both sides, it is fair to say that the discovery concluded on April 22, 1981 has been thorough and complete. Many of the basic facts are not in dispute; what is sharply contested are the inferences to be drawn therefrom.

PRESENT POSTURE

Pursuant to the Court's timetable, plaintiffs, defendants and the intervening defendant filed motions for summary judgment on May 22, 1981. Oppositions were filed by the parties on June 12, 1981, as well as a memorandum of the United States Senate in support of the motions of defendants and intervening defendant and in opposition to plaintiffs' motion for summary judgment. The matter was argued at length on September 30, 1981.

STATUTORY BASIS FOR THE FRANKING PRIVILEGE

1. *The History of the Frank*

The origin of the franking privilege can be traced to 17th Century England, when the privilege was granted to Members of the House of Commons concurrent with the establishment of the first public postal service in that country. The clear purpose then, as it is today, was to facilitate the carrying on of official business.

In 1775, the Continental Congress authorized the use of the frank by its own members and by those on active

duty in the Continental Army. The First Congress, when it acted to establish a postal system in 1789, retained the privilege for official correspondence and documents. In 1873, after the Civil War, the privilege was temporarily abolished by Congress, but was restored in *proprio vigore* in 1895. 28 Stat. 593, 622 (Sec. 85).

Until the comprehensive revision of 1973, the Act of 1895 authorized Members of Congress to use the frank for correspondence on "official business." The responsibility to interpret the meaning of the term "official business" was exercised by the Post Office Departement, which, upon request of anyone, including members of the public, provided official guidance in the form of advisory opinions as to whether a mailing or contemplated mailing could be franked.

This procedure was changed in 1968 when, in recognition of the practical as well as possible constitutional problems of its advisory position, the Department decided to give up its practice of issuing opinions to members of the public. It did, however, continue to give advisory opinions to Members of Congress until 1971, when, with the establishment of the new Postal Service, the Post Office Department relinquished any remaining responsibility in this area.

This confused state of affairs led to a spate of lawsuits in the federal courts of four different circuits by candidates running against incumbent members. At least two of these challenges, focused on the propriety of certain franked mailings by particular members,[3] were an

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[3] *Schiaffo v. Helstoski*, 492 F.2d 413, 430, n.89 (3d Cir. 1974); *Hoellen v. Annunzio*, 468 F.2d 522, 526 (7th Cir. 1972) (permitting the use of extrinsic evidence in addition to content, *i.e.*, timing and other characteristics of franked mailings, as relevant to the sender's motive and the question whether the mailings were made to further an incumbent's election rather than the conduct of his official responsibilities as a legislator).

acute embarrassment to Congress. Other more flagrant abuses surfaced, among them the reported event of a member mailing his lawn furniture to Bimini in the Bahamas, under a frank with the tag reading "Official Business." The combination of these factors plus the threat of further lawsuits led to Arizona Congressman Morris Udall's introduction of H.R. 3180 in early 1973. Similar proposals were introduced in the Senate, and after the differences between the two bodies were accommodated in conference, the Franking Act of 1973, Pub. L. No. 93-191, was signed by the President and became law on December 18, 1973.

2. *The 1973 Statute*

The statute is set forth primarily in 39 U.S.C. §§ 3201, 3210-19. In this litigation, our attention is focused on section 3210.

In its opening declaration of policy, the statute states that the privilege of sending mail under the frank is "to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States." 39 U.S.C. § 3210(a)(1). "Official business" is defined to

> cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally or to the functioning, working, or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the requesting of the views of the public, or the views and information of other authority of government, as a guide or a means of assistance in the performance of these functions.

39 U.S.C. § 3210(a)(2).

There follows a list of what the Congress considered to be frankable mail matter. The list includes, but is not limited to:

(a) Mailings to any person or any government official regarding programs, decisions and other matters of public concern. § 3210(a)(3)(A);

(b) The "usual and customary congressional newsletter or press release." § 3210(a)(3)(B);

(c) The "usual and customary congressional questionnaire." § 3210(a)(3)(C);

(d) Mail expressing condolences to a person who has suffered a loss or congratulations to a person who has achieved some personal or public distinction. § 3210(a)(3)(F);

(e) Mass mailings of federal documents and publications and publications containing items of general information. § 3210(a)(3)(G);

(f) Mail consisting of voter registration or election information or assistance. § 3210(a)(3)(H);

(g) Mail including a biography or autobiography of a member or family members which is part of a federal publication or in response to a specific request and not included for publicity purposes in a newsletter or other mass mailing. § 3210(a)(3)(I);

(h) Mail containing a picture, sketch or other likeness of a Member which is part of a federal publication or in response to a specific request, or, when contained in a newsletter or other mass mailing, is not of such size or does not occur with such frequency as to lend to the conclusion that the purpose is to advertise the Member, rather than illustrate the accompanying text. § 3210(a)(3)(J);

By way of contrast, the unauthorized uses of the frank are specified to cover the following: purely personal mailings unrelated to official business, § 3210(a)(4); mailings "laudatory and complimentary" of a member "on

a purely personal or political basis," § 3210(a)(5)(A); "greetings" from the spouse or other members of the member's family, § 3210(a)(5)(b)(i); reports on how and when the member or his spouse or family spends time other than in connection with legislative, representative, and "other official functions," § 3210(a)(5)(B)(ii); mail "which specifically solicits political support," § 3210(a)(5)(C); and "any mass mailing . . . less than 28 days immediately before the date of any primary or general election. . . , § 3210(a)(5)(D).

The statute therefore permits franked mass mailings (defined to mean newsletter and similar mailings of more than 500 pieces) when they are made at least 28 days prior to a primary or general election. 39 U.S.C. § 3210(a)(5)(D). The statute also allows a member of the House to use the frank on postal patron mass mailings addressed not only into the area of his congressional district, but also into an area which he does not exactly represent, but in which he will be a candidate in the next election because of redistricting. 39 U.S.C. § 3210(d)(1)(A) and (B). Accordingly, material may be mass mailed under the frank to points outside the district of a Representative or outside the state of a Senator, subject only to the 28-day restriction.[4] Materials such as newsletters and press releases printed with campaign contributions are specifically permitted to be mailed under the frank. 39 U.S.C. § 3210(e).

It is clear from the legislative history, as well as from the text of the statute, that the 1973 Act was designed to give explicit approval to the traditional uses of the

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[4] In providing that the frankability of mail matter shall be determined "by the type and content of mail sent, or to be sent," this section also overturned the effect of *Hoellen, supra*, in which Judge (now Justice) Stevens stated that "we should not close our eyes in the face of extrinsic evidence which reveals that an appearance of official business is nothing more than a mask for a private purpose." *Hoellen, supra*, at 526.

frank. As Congressman Udall, the leading supporter of the legislation, stated more than once, the approved uses were intended to be a summary of present practices. He emphasized that "we are simply confirming the sound, solid, responsible use of the frank which the vast majority of Members of Congress have always followed." [5] The entire legislative history confirms the position expressed by Congressman Udall.

3. *The House Commission on Congressional Mailing Standards and the Select Committee on Standards and Conduct of the Senate (now Select Committee on Ethics)*

The 1973 statute also established for the House of Representatives a special commission composed of members and known as the "House Commission on Congressional Mailing Standards," (hereinafter House Commission) and for the Senate, the Select Committee on Standards and Conduct of the Senate (hereinafter Senate Committee). 2 U.S.C. §§ 501, 502. Both groups are required to "provide guidance, assistance, advice, and counsel, through advisory opinions or consultations, in connection with the mailing or contemplated mailing of franked mail" under the 1973 Act. 2 U.S.C. §§ 501(d), 502(a). The Act also specifically provides for an administrative procedure for the receipt, investigation and hearing of complaints concerning alleged violations of the franking statute and limits the jurisdiction of the federal courts hearing such complaints.[6] Both the House Commission

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[5] *See, e.g.*, 119 Cong. Rec. H 2600 (Apr. 11, 1973); *see also Congressional Perquisites and Fair Ethics: the Case of the Franking Privilege*, 83 Yale L.J. 1055, 1062-74.

[6] 2 U.S.C. §§ 501(e), 502(b), 502(c).
In the case of complaints concerning House members, judicial review is on the basis of the administrative record before the House Commission. § 501(e). In the case of the Senate, judicial review, while apparently *de novo*, cannot take place until after the filing of the complaint and decision thereon by the Senate Committee. § 502(c).

and the Senate Committee are required to "prescribe regulations governing the proper use of the franking privilege." 2 U.S.C. §§ 501(d), 502(a).

Each House of Congress, in response to the statute, has enacted formal rules which set further limits on the kind of material which may be franked. House Rule XLVI;[7] Senate Rule XLVIII, renumbered as 48(3).[8] While varying in certain respects, the Rules of both branches of Congress reflect concern as to the adequacy of the 1973 Act in two important respects:

(a) They extend the prohibition on mass mailings before a primary or general election in which the Member is a candidate from the 28 days permitted under the statute to 60 days.

(b) They require that the costs of mass mailings be defrayed exclusively from appropriated funds, although the statute permits the franked mailing of such material when paid for out of campaign funds.

4. *Public Law No. 97-69*

Most recently, Public Law No. 97-96, enacted on October 26, 1981, has further amended the 1973 statute by embodying the above two provisions of the House and Senate Rules as well as the prohibition barring mass mailings outside a member's district, when he is a candidate for another public office. The new law also extends

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[7] Adopted March 2, 1977 in H.R. 287. In addition, the House Commission on Congressional Mailing Standards, pursuant to its Rule XLVI, has issued extensive regulations governing the use of the frank and rules of practice in proceedings before the Commission. *Regulations on the Use of the Congressional Frank by Members of the House of Representatives* (February, 1979).

[8] Adopted April 1, 1977 in S.R. 110. The Senate Select Committee on Ethics has similarly implemented its Rule XLVIII through the issuance of regulations. The latest of these are *Regulations Governing the Use of the Mailing Frank by Members and Officers of the United States Senate* (June 26, 1979).

the postal patron mailing privilege to the Senate and directs the Senate Committee on Rules and Administration to establish limits on such mailings.[9] Furthermore, the statutory authorization for letters of condolence and congratulations for personal distinction is eliminated and letters of congratulation can be sent only for "some public distinction."

To summarize, since this action was originally brought, the Congress has tightened considerably the respective features of the 1973 Act, particularly by incorporating into law the two important limitations embodied in the House and Senate Rules and implementing regulations and by eliminating authorization for the franking of all letters of condolence and certain letters of congratulations. The plaintiffs nevertheless remain firm in their challenge.

THE ISSUES

It is in the context of the foregoing statutory scheme governing the use of the franking privilege that two paramount issues are presented:

1. Whether the statute, as written and implemented, deprives the plaintiffs of their right to a fair political process, in violation of their constitutional rights under the First and Fifth Amendments.
2. Whether the statute recognizes and protects the constitutional right and duty of Members of Congress to communicate with their constituents and at the same time limits any incidental adverse effects on the political process.

THE FACTUAL RECORD

We are convinced, after careful review of the evidentiary record [10] amassed over the length of discovery in

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[9] Present House Rules limit such mailings to six per year.

[10] Contained in plaintiffs' voluminous Statement of Material Facts Not in Dispute incorporating plaintiffs' Request for Admis-

this case, that the basic facts underlying plaintiffs' challenge are not in dispute. We, therefore, set out our findings of fact in this case for the principal purpose of providing a clear context for our discussion and decision on the differing legal and constitutional arguments made. We preface these findings with two general assumptions, neither of which is genuinely disputed.

First, it stands to reason that incumbency alone is a valuable asset to the public official who seeks reelection. An incumbent Member of Congress enjoys a certain "visibility" among his constituents that a challenger may find difficult or impossible to match. It is also beyond argument that any communication with constituents, whether through local meetings or through the mail or mass media, contributes to such visibility and thus may have a direct effect (however slight) in influencing the outcome of an election. To the extent that the effect is positive from the incumbent's standpoint, it is undoubtedly detrimental to his challenger's position. This is so whether the communication is part of an overt campaign effort or made simply in the normal course of a member's representative function.

Second, there is little doubt that the franking privilege is a valuable tool in facilitating the performance by individual Members of Congress of their constitutional duty to communicate with and inform their constituents on public matters. As noted earlier, it is this particular duty which has justified the frank through its history.

Plaintiffs do not argue with the necessity of or public value in some kind of Congressional franking privilege. Their challenge before this court is based only on assertions that section 3210, as it stood in 1973 and, notwith-

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sions (570 requests) and defendants' responses thereto. The extensive response of defendant intervenor alone to plaintiffs' Request for Admissions comprises 622 pages.

standing increased restrictions embodied in the Rules of both Houses and in subsequent amendments, even as it stands now, is drafted to enable more than the justifiable uses—that it permits Members of Congress to use the frank to make campaign-related mailings, particularly mass mailings.[11]

On the basis of the convincing evidentiary base offered by plaintiffs to support their argument, we make the following findings and offer a sampling of supporting evidence:

1. Members of Congress and their staff have received advice from many sources to take full advantage of the franking privilege in their campaign efforts. The publication of *The Job of the Congressman*, co-authored by Congressman Morris Udall, Chairman of the House Commission on Congressional Mailing Standards and sponsor of the bill which became the Franking Act of 1973, advises members of the benefits of such use. Campaign committees from both the Republican and Democratic parties have held seminars for congressional staff members concerning the effective use of newsletters, questionnaires and other franked mailings. The Republican Senatorial Committee employed a direct mail consultant to give advice concerning effective campaign use of mass mailings—including franked mailings. A 1974 Democratic Campaign Committee manual entitled "Maximum Campaign Budget" called for integration of targeted franked mass mailings into overall campaign strategy. It is apparent that at least some members and their staffs believed that the use of franked mailings can be politically beneficial and should be employed.

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[11] Plaintiffs object specifically to several types of mass mailings explicitly or implicitly permitted by the provisions of section 3210; mailings including self-laudatory material; reports concerning visits to Washington by constituents; solicitation of political support (falling short of the specific requests barred by the statute); congratulatory messages; and questionnaires.

2. At least some Members of Congress used direct mail consultants during the 1972, 1974 and 1976 campaigns to build mailing lists and to help integrate franked mailings into the overall campaign strategy.

3. Several Senators and Representatives have targeted franked mass mailings in ways that frequently have no relationship to official business and which are closely connected to reelection plans and strategy. Such targeted mailings, which are identified and documented, make use of voter registration lists and may be designed to convey views on an issue to a select group which is likely to be receptive to those views. Mailings may be made to voters on the basis of demography (race, religion, sex, age), geography, political affiliation or membership in special interest groups. The importance of special interest group mailings and of targeted mass mailings is demonstrated by the fact that, during the period from 1973-75, less than two percent of franked mass mailings by Senators were general newsletters.

4. The "usual and customary congressional questionnaires," frankable under section 3210(a)(3)(C), are often used for purposes other than merely determining constituents' views on particular issues. They may be used to obtain demographic and other information helpful to identifying recipients for targeted mailings, thus facilitating the member's political "responsiveness" to various groups and interests.

5. Members often include self-laudatory material in franked mailings, including favorable editorials, reports of awards, compliments of others concerning the member's performance of his duties, pressure group ratings, and the like. They also use franked mails to compliment and honor constituents to generate good will which, according to plaintiffs, improves the members' chances of reelection.

6. The House Commission on Congressional Mailing Standards has specifically approved the uses of the frank-

ing privilege described above. Mailings referred to in these findings and made by Senators were registered with the Secretary of the Senate.

7. The volume and timing of franked mass mailings, revealed by data stipulated by the parties to be reasonably accurate, indicate widespread use to promote incumbents' reelection efforts. The volume of franked mass mailings is significantly higher in the year preceding House or Senate elections than in the year following elections. The volume builds to a peak just before the preelection cutoff and drops sharply. The volume of nonmass franked mailings stays relatively constant from year to year in both the House and the Senate. It is an undeniable conclusion that the fluctuations in the volume of franked mass mailings are caused by the electoral cycle, rather than by fluctuations in legislative activity.

8. Measured in financial terms, the franking privilege confers a substantial advantage to incumbent Congressional candidates over their challengers. We find that Congress recognized the potential financial benefits conferred by section 3210 on campaigning incumbents at the time it passed the Act.

9. We make no specific finding concerning the extent to which use of the franking privilege has contributed to the electoral victories of any incumbent Members of Congress. We are inclined by the lack of evidence on this point to conclude only that there is no statistical relationship between the use of the frank and the outcome of an election and that proof of the decisive impact of the privilege in any particular election is elusive, whatever the potential financial benefit of the frank.

ANALYSIS

It is the plaintiffs' basic position that the First Amendment and the equal protection component of the Fifth Amendment mandate that the government remain neutral

in electoral matters and avoid any action which unfairly benefits some participants in the political process to the detriment of others. They claim that by affording what amounts to a postage subsidy which may be used to send materials which promote an incumbent's efforts toward reelection, the franking statute violates this constitutional principle of fairness.

Defendants on the other hand vigorously deny that the franking statute is constitutionally unsound, asserting that the bounds of the franking privilege have been drawn to facilitate the constitutional duty of Members of Congress to communicate with their constituents, and at the same time to limit as much as possible any adverse effects on the political process. It is to the constitutional issues underlying these opposing positions that we now turn our discussion.[12]

THE FIRST AMENDMENT ASPECTS OF PLAINTIFFS' CLAIMS

The "Freedom of Speech" clause of the First Amendment, according to plaintiffs, protects several aspects of the political process with which the frank, by providing

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[12] The additional issue of plaintiffs' standing to bring this action has been raised at numerous times during this litigation. Defendant-intervenor argues that, despite all the evidence offered by plaintiffs, there is little showing that the "injuries" suffered by members of the plaintiff group who have run against and lost to congressional incumbents were caused by operation of the frank. Our attention is then drawn to several cases, including *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), for the principle that standing cannot be based on speculative and tenuous theories of causation and injury.

We do not regard the issue of standing as a frivolous one and acknowledge that there may be a legitimate concern over whether plaintiffs' limited showings are sufficient to establish standing. We also recognize that the type and cause of injuries claimed in this case are not easily subjected to proof. Rather than to resolve the complexities of this issue, we prefer to confine our holding to plaintiffs' constitutional claims.

a subsidy to incumbents, interferes and harms. These include, under plaintiffs' analysis, the ability of candidates to win elective office, to attract financial support, to communicate with citizens, to educate the public and to influence the political discourse of a campaign. While we do not agree with plaintiffs that there is a First Amendment-based right to win elective office, we agree that important aspects of the political process do fall within the general rubric of speech under the First Amendment. As the Supreme Court stated in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) the constitutional standard that a person's speech remain unfettered and unabridged by governmental action "has its fullest and most urgent application precisely to the conduct of campaigns for political office."

While plaintiffs do not claim that their right to speak, to vote and to associate for political ends have been *directly* restrained by the franking statute, this absence of direct restraint does not render the First Amendment protections inapplicable. It is well-established that "the Constitution's protection is not limited to direct inference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Claims of First Amendment violations demand heightened judicial sensitivity, "[e]ven where a challenged regulaton restricts freedom of expression only incidentally." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69 n. 7 (1981). *See also Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

The essential element of plaintiffs' argument is that, to the extent that it enables Members of Congress to use franked mail to promote their own campaign efforts, the franking statute works an effective restriction on challengers' access to the political process, thereby violating rights of expression and association. It is argued that the postal subsidy effectively created by the franking statute violates the rule under the combined First and Fifth Amendments requiring that the government neither im-

pose unequal burdens nor grant unequal benefits upon participants' exercise of their rights to speech and association in the politicial process. Although we endorse the principle that protection of the fundamental fairness of the political process is necessary to ensure the uninhibited competition of candidates and in ideas which "is at the core of our electoral process," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), and accept that granting financial benefits to some interests may be under some circumstances the same as restricting the First Amendment rights of others, *see Taxation with Representation of Washington v. Rogers*, 676 F.2d 715, 744 (D.C.Cir. 1982), we do not accept plaintiffs' contention that the facts of this case require strict judicial scrutiny of the statute at issue.

It is clear from our reading of Supreme Court cases involving governmental restrictions on the exercise of free speech that the standard of strict scrutiny, which requires that the government justify a particular regulation by demonstrating that it "is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end," *Widmar v. Vincent*, 102 S. Ct. 269, 274 (1981), is reserved for those instances where the restriction impacts *directly* on the *content* of the restricted communication. *See, e.g., Widmar v. Vincent, supra; Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). We do not believe that this is such a case, and is distinguishable in important respects from the decision in *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980), upon which plaintiffs principally rely.

In *Greenberg*, a First Amendment challenge was raised against a statutory scheme granting the two major po-

litical parties special reduced mailing rates while denying similar rates to minor parties. Plaintiffs argued in that case that by denying them the same discounted postal rates enjoyed by the major parties Congress had restricted their access to the mails and thereby had violated their First Amendment rights of expression and association. The court correctly observed that regulation of First Amendment rights of expression must be "content neutral," noting that "[t]he Supreme Court has often explained that '. . . above all else, the first amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.*, at 774, quoting *Police Department of the City of Chicago v. Mosley*, *supra* at 95-96. The court then determined that the statute challenged in that case was not content neutral. It reasoned that by drawing a line between major and minor parties, Congress had granted a postal subsidy for the expression of the most "popular" political ideas while refusing similar advantages to those who held political positions substantially different from those of the major parties. It concluded that

> [b]y subsidizing the mailings of the Republicans and Democrats, the government has chosen to benefit those with popular views and burden those with unpopular views. To handicap the mailing of campaign literature because a political party has not achieved a required level of acceptance is not different from censoring speech because of its substance.

Greenberg, 497 F. Supp. at 776.

The principal difference between this case and *Greenberg* is in the nature of the restrictions worked by the statute. In *Greenberg* the restrictions were direct and drawn along party lines. They therefore effectively limited the expression of particular political *ideas*. Although this case involves issues of access to the political process simi-

lar to those raised in *Greenberg*, the impact here is not upon defined political positions. The lines drawn by the franking statute distinguish *individuals*, not ideas. And because the individuals affected—non-incumbent congressional candidates—must be presumed to represent the full spectrum of political ideology, we cannot hold that the franking privilege creates any discrimination or restriction which is content related. This case does not fall within the rationale for strict First Amendment scrutiny adopted in *Greenberg*.

In fact, beyond acknowledging that the franking statute has some limited impact upon speech-related rights, the First Amendment finds little place in our analysis. Although the language of the First Amendment ensures that one's own speech be free, unfettered, and unabridged, it does not alone require that each individual be entitled to this particular privilege of incumbency that certain others may enjoy.[18] For this reason, questions of the constitutionality of governmental-created imbalances are much better suited to analysis under the principle of equal protection than under freedom of speech. It is thus to the Fifth Amendment that we now turn.

THE FIFTH AMENDMENT CLAIMS

The plaintiffs' equal protection argument is direct and straightforward: by permitting the franking of materials which may be sent for no purpose other than to advance incumbency, the franking statute affords campaign advantages to incumbents, seriously imbalancing the political process to the detriment of any challengers. Plaintiffs argue that because of its impact on rights to free speech under the First Amendment the discrimination

[18] We cannot ignore the fact that the plaintiffs' arguments against this particular advantage of incumbency can also be directed against others, *i.e.*, greater access to the media, local and national, one or more local district offices, staff paid out of public funds, WATS line for telephone calls to and from constituents, etc.

worked by the franking statute may be justified only by demonstrating a compelling interest.

The cases offered by plaintiffs to support their argument that the government may not discriminate among candidates by unequally imposing handicaps on some or granting benefits to others deal almost exclusively with the same sort of content-based discrimination discussed briefly above—drawing lines of distinction by party affiliation or ideology. We find little discussion in case law relating to the advantages which incumbents may enjoy simply by virtue of their incumbency over any challengers who seek this in public office.

In *Elrod v. Burns*, 427 U.S. 347 (1976), for example, the Supreme Court held that patronage dismissals violated the First and Fourteenth Amendments. The basis of the holding, however, was not necessarily that an incumbent might use the system to tip the electoral balance unfairly against any challenger, but that the threat of dismissal severely restricted the political beliefs and associations of the employees affected. The Court held that the requirement that employees pledge political allegiance to one party or another, work for the election of other candidates of the incumbent party, contribute a portion of their wages to the party, or obtain the sponsorship of a member of the party, all in order to maintain their jobs imposed an unconstitutional condition on the right to continued employment. There is no similar condition in this case. The franking statute imposes no direct condition upon the right of any person to challenge an incumbent, to support one or another party in a particular election, or to use the mails. Its impact upon political speech and association is at most indirect, and then only to the extent that it may make campaign-related communication through the mails more expensive for a non-incumbent candidate than for the incumbent who seeks reelection and uses franked mail to promote that end.

We cannot overlook the fact that, despite their broadside objections to the franking statute, plaintiffs concede that the frank serves an essential public purpose in facilitating communication with constituents and that some sort of franking privilege is necessary in the performance of official congressional business. They concede that the problem is merely one of drawing lines—striking a proper balance between legitimate and illegitimate uses of the frank.

The franking statute effectively draws two lines of demarcation. The first is drawn by the granting of the franking privilege to Members of Congress only. In general, this distinguishes Congress from the general public, and also has the effect of drawing the line between incumbent and non-incumbent congressional candidates. Plaintiffs do not argue that non-incumbents should also be afforded the franking privilege. They seek only to limit its use by Members of Congress. The second line drawn by Congress draws a distinction between official and unofficial use of the frank. Our sole concern is with this second line of demarcation and to this we direct our attention.

Under present practice a mailing is considered to be "official" if, on its face, it falls within the permitted types (or at least outside of the prohibited types) of materials listed under section 3210. The statutory test does not look to motives, but only to "the type and content of the mail." § 3210(e). Plaintiffs argue that attention to content only, without considering the motives for sending a particular mailing, enables Members to use the frank for the *unofficial* purposes of promoting reelection. Plaintiffs thus fault the present franking statute and congressional practice for failing to subject franked mailings to a test of official versus unofficial *motivation*. Absent standards based on underlying motives, plaintiffs urge that the franking statute be modified to eliminate categories of mailings which have been prone to abuse in the past. We cannot accept plaintiffs' suggested cause of action.

Were the frank shown to be available and widely used for reelection purposes and had plaintiffs demonstrated that such use has a substantial detrimental impact on opposing candidates or members of the voting public seeking to educate themselves on the candidates and the issues, plaintiffs' claims, particularly those based on the First Amendment, would have considerable merit. But such level of interference with the electoral process has not been shown in this case. We are hesitant to apply a standard under the guise of strict judicial scrutiny to a situation where there has been no demonstration of significant harm to the plaintiffs' constitutional rights. The conceded and undisputed legitimate interests promoted by the franking statute are sufficient to justify the limited impacts on the rights of the plaintiff class and to satisfy the invocation of the rational basis test, which we apply in this case. We cannot hold the franking statute unconstitutional simply because it sets forth a standard to determine "official" uses of the frank different from that proposed by plaintiffs.

It is important to view the franking activities of Members of Congress from an overall perspective. It seems undeniable that all mailing franked and unfranked, from any particular Member of Congress may be grouped into three types. The first type is composed of "official" mailings, those related directly to the legislative and representative functions of Congress. This is the type of communication which Members of Congress arguably are under a duty to provide and to which the frank has been extended over the past 200 years. At the other extreme are mailings which are on their face political or private and therefore "unofficial" in nature. Congress itself has recognized the dangers, constitutional as well as practical, of extending the franking privilege to these types of mailings and has excluded them or expressly prohibited them under the statute and rules in both Houses. Between these two extremes lies a class of mailings whose purposes are less

easily discernible. For example, it is undeniable that Senator X, acting in his elected capacity, should have a right to make mailings within this middle area related to his official duties. It is equally obvious that this same individual acting as candidate for the Senate has an interest in mailing the same material to prospective voters to promote his campaign efforts. Thus the motivations, even behind a particular mailing, may be mixed. Plaintiffs' complaints here can only be about the actions and purposes of the candidate, however, and not the senator.

Congress drafted the franking statute expressly to include many of the types of mailings which unquestionably fall within this middle area. This of itself does not require that we invalidate the scheme as unconstitutional. The question before us is not whether the particular line which Congress has drawn between "official" and "unofficial" uses of the frank necessarily has the least possible potential, in comparison with other methods of drawing the line, for adversely affecting challengers effective access to the mails. The question is only whether the line is a reasonable one.

A statutory scheme need not be drafted or even administered so as to eliminate completely all possible abuses before it is constitutionally acceptable. We can be concerned only with whether the standard adopted bears a rational relation to the twin goals at hand: one, to facilitate (even encourage) official communication and two, to discourage or eliminate unofficial communication. It is clear from the record that Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection. The details of the franking scheme, including its distinction between official and unofficial mailings, appear to be rationally designed to work for that end. (It is relevant in this regard that the record in this case consists principally of *abuses* rather than routine uses of the franking privilege). It would be most inappropriate for the judiciary to step in

and demand that Congress restructure this scheme under the circumstances of this case.

To state the obvious, it simply is impossible to draw and enforce a perfect line between the official and political business of Members of Congress. The franking privilege is only one of many perquisites afforded to them which may be turned one way or another into a campaign advantage over any challenger. We have already accepted as an assumption and stressed the fact that an incumbent is, by virtue of his incumbency alone, much more visible to the voting public than is a would-be challenger. He has greater access to the media, both local and national; he usually has one or more offices in his home district, in addition to his Washington office; he has a staff paid out of public funds; he was a WATS line for telephone calls which he may use to communicate with his constituents.

Plaintiffs do not suggest that the incumbents' use of these tools of office be strictly limited to purposes which cannot possibly contribute to efforts at reelection. This would be a most difficult standard to administer in any case, for each and every act of an elected representative may, in a political context, be seen as an effort to demonstrate that the voters' choice was a good one. It is impossible, without probing into the deepest thoughts and motives of an individual Member of Congress, to determine exactly why he votes as he does on a particular issue, why he casts a letter to a constituent in the terms in which it is cast, why he communicates with other Members of Congress as he does, why he assigns particular staff functions as he does, or why he does any of the myriad of things that a Member does in his day-to-day routine. It is no less difficult to apply and administer a subjective standard in the use of the frank. Moreover, we cannot require that such a standard be substituted for what we accept as an already reasonable objective standard adopted under section 3210.

For similar reasons, we cannot hold that the particular types of mailings to which plaintiffs object are so prone to abuse that they should not be permitted. Just as plaintiffs have identified the suitability of mass mailings (targeted or general), newsletters, questionnaires and other materials for campaign purposes, there is not a type of mailing challenged which is not also suitable for legitimate "official" purposes. Targeted mailings, for example, may be a means of directing discussion or information on particular issues to those groups in a particular Member's constituency which might be most affected, at the same time saving the cost of preparing and mailing information to individuals who are less likely to be interested. And notwithstanding allegations that questionnaires are most often used to obtain demographic information beneficial to a candidacy, it goes without saying that any method of obtaining constituents' views and impressions on particular issues may be invaluable to a Member of Congress who truly considers himself responsible to the people.[14] It does little, therefore, for the plaintiffs to emphasize the potential in these types of mailings for abuse, without also acknowledging the legitimate ends to which they are put. We are not convinced by any of plaintiffs' arguments that there exists no rational and legitimate basis for Congress' decision to retain these particular "middle area" uses of the frank within the stated category of "official use," and we defer to the judgment embodied in the statute.

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[14] While we need not agree with defendant-intervenor's sanguine appraisal that the typical member follows the advice of Edmund Burke to the voters of Bristol in 1774 and votes his own conscience rather than following the expressed wishes of his constituents, it is nonetheless true that members, to be successful representatives, must be least learn at the outset the views of those who put them in office. Thereafter, they must keep themselves informed.

PRUDENTIAL CONSIDERATIONS

Our deference to Congress is guided also by important prudential considerations. We must give weight to the fact, mentioned earlier, that section 3210 was originally enacted in an attempt to curb widespread abuses of the franking privilege. It has since been refined by detailed regulations in each house to meet the more obvious of objections which arise even under its amended language. The House and Senate have also established machinery to monitor, review, and receive complaints concerning uses of the frank.[15] The plaintiffs seek to have the Congress, through judicial compulsion, "redraw the line" and strike a different balance. This we decline to do for at least two compelling reasons. First, the distinction between "official" and "unofficial" cannot be sharply defined or delineated and for the court to assume this burden would be an impossible task. Second, to grant the relief which plaintiffs seek would in effect require us to issue rules of behavior superseding those that Congress, a coordinate branch of government, has responsibility set for itself. It is not this Court's function to examine the policing efforts of committees created by congress to deal with the particular types of concerns raised by plaintiffs in this case with an eye to compel even more refined standards and closer examination. The United States Court of Appeals for the District of Columbia recently manifested a reluctance "to develop rules of behavior for the Legislative Branch," or "to monitor every action taken by a senator and his aide in an effort to determine whether it is sufficiently 'official' or too 'political,' " *United States ex rel.*

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[15] For example, each house has its own method for policing mass mailings, which, as must be apparent, are the greatest single source of plaintiffs' claims of abuse. In the House, before sending a mass mailing a Member must first submit the same to the Franking Commission for an advisory opinion. In the Senate all mass mailings must be registered with the Secretary of the Senate and are available for public inspection.

Joseph v. Cannon, 642 F.2d 1373, 1384, 1385 (D.C.Cir. 1981). We follow course in this case.

CONCLUSION

We do not suggest that the franking privilege may never be shown to create such an imbalance in the campaign process as to constitute a cognizable interference with important rights. We hold only that the level of impact has not been shown to be sufficient in this case for us to assume the responsibility of redrafting a statute or promulgating regulations to govern the congressional use of the frank. Our rationale for rejecting plaintiffs' claims under the First and Fifth Amendments holds as well for the challenge raised under the General Welfare Clause of Article I, Section 8. We find no constitutional violation.

For the foregoing reasons we grant judgment to the defendants and defendant-intervenor and dismiss the complaint.

An order consistent with the foregoing has been issued this day.

/s/ Malcolm Richard Wilkey
United States Circuit Judge

/s/ George L. Hart, Jr.
United States District Judge

/s/ J. H. Pratt
United States District Judge

September 2nd, 1982.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON
CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

Filed Sept. 7, 1982

ORDER

Upon consideration of plaintiffs' motion for summary judgment, defendants' and intervenor-defendant's motions for summary judgment, the oppositions of the respective parties thereto, the motion of the United States Senate, amicus curiae, in support of the motions of defendants and intervening defendant and in opposition to plaintiff's motion for summary judgment, and the entire record and after argument, it is by the Court this 2d day of September, 1982,

ORDERED that:

(1) plaintiffs' motion for summary judgment be and the same is hereby denied;

(2) The motions of defendants and the intervening defendant for summary judgment be and the same hereby are granted;

(3) The above-entitled action shall stand dismissed.

/s/ Malcolm Richard Wilkey
United States Circuit Judge

/s/ George L. Hart, Jr.
United States District Judge

/s/ J. H. Pratt
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

512 F.Supp. 26

COMMON CAUSE, *et al.*,
Plaintiffs,

vs.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant,

and

UNITED STATES SENATE,
Amicus Curiae.

Filed Dec. 11, 1980

MEMORANDUM OPINION

PRATT, District Judge.

This action challenges the constitutionality of certain portions of the congressional franking statute, 39 U.S.C. § 3210 (1976 ed.). Plaintiffs, whose members include more than fifty candidates challenging incumbent members of Congress for election, contend that the statute is unconstitutional on its face and violates their First and Fifth Amendment rights by subsidizing the election of incumbent congressmen but not of challengers. The defendants, the intervenor and the *amicus curiae* have moved to dismiss contending that plaintiffs lack standing, that the action is unripe and moot, and that this court

should dismiss the case on prudential grounds. This is the third such motion to dismiss that defendants have made since this case was first filed in 1973. For the reasons stated below, the motion to dismiss is denied.

I. *Standing*

Secretary of the Treasury Miller and Postmaster General Bolger, the defendants, the House Commission on Congressional Mailing Standards, the intervenor, and the United States Senate, *amicus curiae*, all contend that Common Cause and John Gardner lack standing to bring this action. If these assertions are correct, and if the plaintiffs are not proper parties to press this claim, the action must be dismissed for lack of jurisdiction under the case or controversy requirement of Article III of the Constitution.

This court has twice denied a motion to dismiss for lack of standing, once by order of June 26, 1974, and once by opinion on February 10, 1975. Earlier rulings of this sort are "law of the case," and on non-jurisdictional issues are normally conclusive. *E.g., Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612, 67 S.Ct. 583, 585, 91 L.Ed. 547 (1947); *Petition of United States Steel Corporation*, 479 F.2d 489, 494 (6th Cir. 1974), *cert. denied*, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973).

Where a jurisdictional challenge is repeated, however, as is the case where standing is in issue, the "law of the case" requirement is less rigid. Earlier jurisdictional rulings are entitled to important, but not dispositive weight. 1B *Moore's Federal Practice* ¶ 0.404, p. 452 (1980 ed.). If it can be shown that controlling authority has subsequently taken a clear contrary view of the issue, then the renewed motion to dismiss for lack of jurisdiction may be appropriately filed and may prevail. *See Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248-49 (2d Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284, 1294 (5th Cir. 1978).

In this factual context, the burden is thus on the proponents of this motion to show that more recent decisions by the Supreme Court and the D.C. Circuit Court of Appeals compel this court to reverse its prior position and dismiss the complaint for want of standing.

It is the position of all defendants that parties in plaintiffs' position must now make more specific and substantial threshold showings as to injury, causation, and redressability as the result of recent decisions.

Specifically, defendants contend that the Supreme Court's decision in *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) and the D.C. Circuit's decision in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 929, 100 S.Ct. 1867, 64 L.Ed.2d 282 (1980), significantly change the law of standing, thereby requiring this court to reverse its two previous rulings. In these two cases, the courts dismissed complaints for lack of standing because plaintiffs failed to allege a "distinct and palpable injury" to themselves, *Winpisinger v. Watson*, *supra*, at 137; *Warth v. Seldin*, *supra*, 422 U.S. at 501, 95 S.Ct. at 2206, an injury "that can fairly be traced to the challenged action of the defendant, and not injury that results from independent action of some third party not before the Court." *Winpisinger v. Watson*, *supra*, at 137, citing *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976). In both *Winpisinger* and *Warth*, *supra*, plaintiffs failed to meet their burden of demonstrating the causality prerequisite to standing.

According to this argument, plaintiffs' asserted interests are those in the election of certain candidates, and the election or defeat of particular candidates depends on too many other factors besides the operation of the franking statute to satisfy the causation requirements laid down in these cases. In other words, it could not be said

that an order by the court granting plaintiffs the relief they seek would have remedied the harm they allege. To the extent that plaintiffs assert an interest in a fair and equal electoral process, defendants assert that such an interest is too remote, speculative, and abstract to confer standing on these plaintiffs to press this claim. Their process claim, according to this argument, is indistinguishable from a generalized grievance of the citizenry about the operation of the political system.

Plaintiffs respond by contending that regardless of electoral outcomes, the interest in a fair electoral process that they assert is directly affected by the defendants' actions under the franking statute. Moreover, plaintiffs allege that they suffer particularized harms distinct from those suffered by the citizenry at large. Under this characterization of the complaint, the causation requirements of the *Warth* and *Winpisinger* cases are not in issue, because the asserted harm *is* the franking statute and defendants' action thereunder. There is no third party action here complicating the issue. Plaintiffs are *directly* harmed by defendants' actions.

We now turn to the complaint and examine it in detail in order to decide which is the proper characterization. Moreover, in ruling on this motion to dismiss, the court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin, supra*; *Jenkins v. McKeithen*, 395 U.S. 411, 421-422, 89 S.Ct. 1843, 1848, 23 L.Ed.2d 404 (1969).

Plaintiff Common Cause sues on behalf of its members who are: [1]

1. Congressional candidates;
2. Contributors of lawful amounts of money to candidates for federal elective office and to political committees and organizations which support such candidates;

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[1] Plaintiffs' Complaint, ¶ 4.

3. Campaign participants;

4. Registered voters for candidates for federal elective office;

5. "Regular and substantial users of the mails as a means of participation in the foregoing activities;" and

6. Taxpayers.

In addition to the interests asserted on behalf of its members, Common Cause asserts its own interest as a "frequent and heavy" user of the mails, having spent $904,313.50 on postage during 1973.[2] Plaintiff John Gardner alleges that he is a taxpaying citizen, residing in Maryland, who is a registered voter, and a contributor of lawful amounts of money to candidates for Congress, and a regular user of the mails for these purposes.[3]

In order for an organization such as Common Cause to bring suit on behalf of its members, it "must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable claim had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. at 511, 95 S.Ct. at 2211; *Sierra Club v. Morton*, 405 U.S. 727, 734-41, 92 S.Ct. 1361, 1365-1366, 31 L.Ed.2d 636 (1972) (emphasis added). *Accord, Committee for Full Employment v. Blumenthal*, 606 F.2d 1062, 1067 (D.C.Cir. 1979); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1008 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 726, 54 L.Ed.2d 756 (1977). Moreover, standing in this situation

> depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed

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[2] *Id.*

[3] *Id.*, at ¶ 5.

> that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Warth v. Seldin, supra, 422 U.S. at 515, 95 S.Ct. at 2213.

Thus Common Cause must meet two tests in order to asserts its members' claims. First, it must seek prospective relief, as it does in this case. Its prayer for relief asks for declaratory judgment and an injunction.[4]

Second, the members themselves must have standing to assert the claims that the organization seeks to assert on their behalf. Common Cause thus stands in the shoes of its members in determining whether there is standing.

A. *As Candidates for Elective Office*

Common Cause alleges that its members include persons who have been and plan to be candidates for federal elective office.[5] More than fifty such members challenged incumbent congressmen in the 1974 election,[6] and, for the purposes of ruling on this motion to dismiss, it is safe to assume that Common Cause has members who ran against incumbents in later elections, and who will do so in the future.

Do these candidates, and thus Common Cause, have standing to challenge the franking statute? We believe that they do. Defendants' and intervenor's reliance on the causation requirements of *Warth v. Seldin, supra*, and *Winpisinger, supra*, is misplaced because the injury involved here occurs regardless of the outcome of any particular election. According to plaintiffs' complaint, this injury consists in granting incumbents what amounts to a subsidy worth more than $50,000 to each incumbent.[7]

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[4] *Id.*, at ¶¶ 28-34.

[5] Plaintiffs complaint, ¶ 4.

[6] Memorandum Opinion of Feb. 10, 1975, at pp. 3-4.

[7] Plaintiffs' complaint, ¶ 20.

This injury is personal to the candidates, substantial in effect, and directly traceable to the operation of the franking statute. In order to neutralize this advantage of incumbency, a challenger must raise substantially greater funds than he otherwise would, or, if he is able, contribute such moneys to his campaign out of his own pocket.[8] The injury is substantial. The dollar value of the "contribution" is more than fifty times the maximum amount an individual can contribute to a congressional campaign, 2 U.S.C. § 441a(a)(1) (Supp. III 1979), and in most cases, more than five times the amount that a political party's central committee can contribute. 2 U.S.C. § 441a (d)(3) (Supp. III 1979). The injury is not only directly traceable to the operation of the franking statute, but as plaintiffs have framed this action, the statute itself *is* the injury because of its alleged facial invalidity.

The Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 631, 46 L.Ed.2d 659 (1976), supports candidate standing to challenge the constitutionality of the franking statute. In *Buckley*, the court found that plaintiffs, including Senator Buckley, had alleged a sufficient personal stake in the outcome of the proceeding —whether certain campaign expenditure and contribution limitations were constitutional—to satisfy Article III's case or controversy requirement. *Id.* Moreover, the court noted that an association could assert the personal interests of its members in such a case. *See id.* at 12, n. 10, 96 S.Ct. at 631, n. 10. Candidate standing to challenge the franking statute is further supported by *Schiaffo v. Helstoski*, 492 F.2d 413 (3d Cir. 1974), and by *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3001, 37 L.Ed.2d 1006 (1973). These decisions held that congressional candidates had standing to challenge the incumbent's use of the frank in election campaigns.

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[8] Individual candidates may contribute as much as they wish to their campaigns. *Buckley v. Valeo*, 424 U.S. 1, 51-55, 96 S.Ct. 612, 650-652, 46 L.Ed.2d 659 (1976).

B. *As Contributors and Campaign Participants*

The analysis of contributor and campaign worker standing is similar. Contributors of "lawful amounts" of money to candidates for federal elective office,[9] and "active participants" in these campaigns suffer injury regardless of the outcome of the election. The purpose of political campaign is often as much to educate the public concerning certain issues as it is to elect a candidate who holds particular positions on these issues. The effectiveness of these contributions and campaign work will be substantially undercut by the funding subsidy of each incumbent. Plaintiffs do not claim that their injuries result from the outcome of elections but rather the fact that the political process is tainted and rendered unfair by the political use of the frank which the statute permits. Thus the causation requirements of *Warth* and *Winpisinger* are satisfied, because the franking statute itself and the conduct permitted thereunder inflicts these harms regardless of the outcome of elections.

C. *As users of the mails as a means of participating in the political process*

Common Cause also alleges that its members include people who are regular and substantial users of the mail for the purposes of making contributions and assisting in the electoral process.[10] In addition, Common Cause alleges that it spent more than $900,000 on mailing costs in 1973, largely for the purposes of promoting the objectives of the organization: making government more responsive through reform of the political process.[11] The injury to Common Cause and its members consists in the grant of what they allege is an illegal mail subsidy to competitors, a form of injury that has traditionally suf-

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[9] Plaintiffs' complaint, ¶¶ 4, 5.

[10] Plaintiffs' complaint, ¶ 4.

[11] *Id.*

ficed to confer standing. The illegal grant of a franchise to a competitor, or the illegal entry of a government-regulated competitor into plaintiff's line of business suffice to confer standing. *See Association of Data Processors v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Hardin v. Kentucky Utility Co.*, 390 U.S. 1, 5-7, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968). Likewise, the illegal classification of a competitor's mail is often a basis for intervention in proceedings before the Postal Service, *see* 39 C.F.R. § 954.10 (1979), just as the Postal Service's failure to follow notice and comment procedures in making nationally applicable changes in organization gives rise to *citizen* standing to challenge the action. *Buchanan v. United States Postal Service*, 375 F. Supp. 1014, 1017-20 (N.D.Ala. 1974), *aff'd in part, vacated in part on other grounds*, 508 F.2d 259 (5th Cir. 1975).

It would be strange to permit commercial mail users standing to challenge the classification of a competitor's mail, and to permit citizens standing to challenge nationally applicable changes in the organization of the Postal Service, but to deny standing to substantial users of the mail for political campaign purposes who seek to challenge the use of *free* mailing privileges by opponents. The amount of money at stake in the subsidized political mailings involved here may far exceed that involved in the commercial context; the complaint alleges that the frank is a campaign subsidy worth more than $50,000 per congressman per election year,[12] and alleges further that the cost of franked mail exceeds 35 million dallars annually.[13]

D. *As Registered Voters*

The complaint further alleges that Common Cause's members include "registered voters for candidates for federal elective office," including challengers discrimi-

[12] *Id.*, at ¶ 20.

[13] *Id.*, at ¶ 18.

nated against by incumbents' illegal use of the frank. These voters have alleged actual injury to themselves apart from electoral outcome, namely, that the franking statute places an unconstitutional burden on the congressional candidates of their choice, and thus on their right to associate freely for political purposes. The franking statute itself, they allege, burdens their political rights and discriminates against them. It is clear that, if the statute does hinder or deny the exercise of these rights, that an appropriate decree by this court would redress the injury, thus satisfying the causation or redressability test of *Warth v. Seldin, supra*, and *Winpisinger v. Watson, supra*.

E. *As Taxpayers*

Finally, Common Cause alleges that its membership includes federal taxpayers whose taxable income is more than six billion dollars a year, and whose federal income tax liability is more than one billion dollars a year.[14] John Gardner alleges that he is a taxpaying citizen as well as a voter, contributor to candidates and political committees and frequent user of the mails as a concomitant of the foregoing activities. Plaintiffs contend that expenditures of federal funds under the franking statute "violate the limitations upon the taxing and spending power of Congress under Article I, Section 8, and contravene the First and Fifth Amendments of the Constitution." [15] As this court recognized in its February 10, 1975 opinion, pp. 2-4, these allegations met the requirements laid down for taxpayers standing in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2962, 41 L.Ed.2d 706 (1974): first, allegations of injury in fact distinct from that suffered by the general populus, and second, allegations of a nexus between the injuries suffered and the constitutional infringements alleged. Defendants contend, in effect, that

[14] Opinion of Feb. 10, 1975, at 3.

[15] *Id.*

even if these requirements of *Flast* and related cases on taxpayer standing are met, that the causation requirements of *Warth v. Seldin, supra,* are not satisfied because the injuries complained of are not fairly traceable to the operation of the franking statute. We have rejected this argument in the contexts discussed above, and now reject it here. We are aware that a single taxpayer has frequently been held to lack standing. This is not such a case.

This dispute over standing boils down to a dispute over the role of congressional elections in our political system. If the purpose of campaigns is only to elect candidates, then defendants' and intervenor's arguments concerning causation and resultant lack of standing might have some weight. Congressional campaigns, however, serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects political advocacy of this type, and infringements of these rights can occur regardless of the success or failure of a particular candidate at the polls. Thus, the causation requirement is satisfied here, for the asserted harm, and its remedy, are not dependent upon electoral outcome, but on the existence of the franking statute and the conduct permitted under its aegis.

II. *Prudential Considerations*

Prudential considerations, it is argued, require this court to dismiss plaintiff's complaint, regardless of standing. According to this argument, grant of the injunctive relief sought by the plaintiffs would require this court to decide an issue for which there are no judicially manageable standards, namely, what constitutes the official business of a Member of Congress for the purpose of the franking privilege. As there are no such standards

for decision of this issue, it follows that there are none for the framing of the requested injunctive relief. The only way to implement the proposed injunction would be for this court to order "an army of Executive Branch censors" to read every piece of franked mail.[16] This relief would lock this court, Congress, and the Executive Branch in a continuing confrontation over the implementation of the injunction, and over what constitutes official business as opposed to electioneering. It was this type of problem which caused the court in *Winpisinger, supra*, to decided as it did, in addition to the matter of lack of standing.

We cannot accept this argument, which in effect is the counsel of despair. Plaintiffs' complaint squarely presents several legal issues for decision, regardless of the content of the mailed matter. The complaint alleges four separate causes of action. Three of the four causes of action deal exclusively with mass mailings of newsletters and news releases[17] independent of their messages, and include those prepared and printed with campaign contributions. The challenged statute explicitly authorizes these mailings. 39 U.S.C. §§ 3210(e), 3210(a)(3)(B), 3210(a)(3)(F), 3210(a)(5)(D), and 3210(d) (1976 ed.). Plaintiffs allege that these mass-mailed newsletters and news releases violate their First and Fifth Amendment rights, and the taxing and spending clause of the Constitution, Art. I, § 8.[18] In addition, plaintiffs allege that by continuing to honor and pay for franked mass mailings, defendants Bolger and Miller violate plaintiffs' constitutional rights, abuse their discretion within the meaning of 5 U.S.C. § 706 (1976 ed.) and unlawfully interpret their statutory duties under 39 U.S.C. §§ 101 and 403 (1976 ed.), and under 31 U.S.C. § 1002 (1976 ed.).[19]

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[16] Defendants' Memorandum in Opposition, at 3.

[17] Plaintiffs' Complaint, ¶¶ 22, 24, 25.

[18] *Id.*, ¶ 22.

[19] *Id.*, ¶¶ 24, 25.

Plaintiffs' other cause of action is also an attack on the facial validity of certain provisions of the franking statute. Besides challenging the authorization for mass mailings within a month of an election or outside a Member's district, this cause of action attacks the use of the frank for mail matter not exclusively related to the performance of official functions including unsolicited mailings of biographical material, campaign literature, condolences and congratulations, self-laudatory material, and reports on the outside activities of a Member and his family.[20] Again, these challenges also involve mass mailings regardless of content, or the statutory authorizations for certain easily recognized categories of franked mail.

Defendants assert that there are no judicially manageable standards for the decision of this case. Lack of such standards has traditionally meant not that the court is presented with a difficult legal question, but that in providing relief, the court would be required to intrude on the exercise of substantial discretion by a coordinate branch of government, discretion conferred by the Constitution and intended to be exclusive, or nearly so. *See, e.g., Baker v. Carr*, 369 U.S. 186, 210-217, 82 S.Ct. 691, 706-710, 7 L.Ed.2d 663 (1962). Even in cases involving foreign affairs issues, where prudential considerations traditionally have played their most important role, the invocation of prudential barriers by one of the litigants does not automatically bar the courts from deciding such a case. *See id.*, at 211-13, 82 S.Ct. at 706-707. Instead the courts carefully examine claims to see if they are in a form fit for judicial resolution. Thus in *Winpisinger, supra*, so heavily relied upon by defendants and intervenor, the Court of Appeals found that prudential considerations strongly counseled against assuming jurisdiction, since the allegations in the complaint related "quite literally, to virtually every discretionary decision made by the Administration acting through high government officials." *Id.* at 139; *see Public Citizen, Inc. v. Simon,*

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[20] *Id.*, ¶ 23.

539 F.2d 211, 217 (D.C.Cir. 1976) (judiciary not to act as a management overseer of the Executive Branch).

Our examination of plaintiffs' complaint shows that this is not a case where prudential considerations should bar us from reaching the merits. This case does not involve major, discretionary policy decisions such as recognition of a foreign government. *See Goldwater v. Carter*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979). Neither does it involve a host of discretionary decisions by numerous political appointees of a particular administration. *See Winpisinger v. Watson*, *supra*. Instead, this case involves arguably discretionary decisions by Postmaster General Bolger and Secretary of the Treasury Miller to implement explicit statutory language requiring them to honor and pay for certain classes of franked mail, and further involves the routine, ministerial decisions by postal and treasury employees in carrying and paying for this mail. This is a dispute which is in a form fit for judicial resolution. The Constitution, caselaw, and the affected statutes provide adequate judicial standards for decision of these claims, just as they have in the context of other challenges involving Congress, elections, and constitutional rights. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

Defendants make a second argument for the invocation of prudential barriers: granting the requested relief would trigger a confrontation between this court, Congress and the Executive Branch. This confrontation would occur, it is argued, because the only way to implement the injunction sought by plaintiffs would be to have the Executive Branch censor each piece of franked mail in order to decide what letters concerned official business and what mail was for electioneering purposes. This court would be faced with continual appeals from those decisions to send or hold franked mail, appeals brought both by disgruntled congressmen and by Common Cause.

This argument is related to the argument over the existence of judicially manageable standards to decide this

case, and like that argument, fails. There are standards both to decide this case and fashion an appropriate remedy. Our examination of the complaint, *supra*, shows that three of the four causes of action deal solely with the *per se* legality of certain types of mass mailings irrespective of content.[21] Moreover, part of the fourth cause of action also involves the timing and destination of certain mass mailings.[22] Injunctive relief would not require examination of the mail's content. Instead, postal and congressional employees could comply using little more than a calendar, a postal map of their district, and simple arithmetic.

Defendants and intervenor have focused on the part of the fourth cause of action concerning the content and origin of certain types of franked mail, and on plaintiffs' prayer for injunctive relief ordering the inspection of franked mail.[23] Assuming arguendo that such inspection is ordered, this court may limit such inspections to avoid the problems of censorship argued by defendants and intervenor. The Postal Service could, for instance, be ordered to restrict pre-mailing inspections to the number, timing, and destination of mass mailings, and to delve into content matters only when such issues are raised by campaign opponents, citizens, or the press. Most or all of the horrors conjured up by defendants could be avoided by carefully tailoring any injunction.

Examination of the full relief sought by plaintiffs shows that the potential inter-branch controversies imagined in the motion to dismiss are illusory. Plaintiffs seek a declaratory judgment that their rights have been violated by the statute and by defendants' actions in implementing it.[24] In addition, they seek an injunction

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[21] *Id.*, at ¶¶ 22, 24, 25.

[22] *Id.*, at ¶ 23.

[23] *Id.*, at ¶ 33.

[24] *Id.*, at ¶¶ 28-31.

against the operation of the statute, and an order to defendants to inspect franked mail and to refuse to honor and pay for it when used for mass mailings and other matters not in the line of official duty.[25]

If this court decides in favor of plaintiffs on the merits, entry of a declaratory judgment as to the statute's illegality will provide a clear standard for Members of Congress to follow in using the frank. We will not lightly assume, as defendants and intervenor seem to in their briefs, that high elected officials would deliberately violate such an order. Entry of such an order alone would probably go far toward securing compliance, and reduce inspection problems.

If this court should decide to enjoin the operation of the franking statute, there are a number of ways to minimize any problems created by such an order. To begin with, this court might stay its order while Congress enacted a new statute or while the decision was appealed to the Supreme Court. The court might also phase in such relief in order to give Members adequate time to familiarize themselves with the decision and its requirements.

To accept defendants' arguments that this court should not concern itself and provide a remedy responsive to the serious allegations of illegality pleaded by plaintiffs would be to admit our lack of judicial authority. This is not a case of *damnum absque injuria*.

We conclude that prudential considerations do not counsel us to refrain from decision of the issues presented by this case, or from entering such relief as may be appropriate.

III. *Ripeness and Mootness*

The Senate, as *amicus curiae*, raises two additional grounds for dismissal: lack of ripeness and the moot-

[25] *Id.*, ¶¶ 32-33.

ness of one of Common Cause's claims. These points need not detain us long, for these contentions are without merit, even making the dubious assumption that *amicus curiae* has standing to raise arguments not pressed by the parties. *See, e.g., Knetsch v. United States*, 364 U.S. 361, 370, 81 S.Ct. 132, 137, 5 L.Ed.2d 128 (1960); *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974).

The Senate contends that this action is unripe because Common Cause did not first press its claims before the House and Senate committees dealing with the frank. The Senate further contends that this action is unripe since the court would have to render its decision on the basis of abstract and hypothetical facts, in essence an advisory opinion forbidden by the case or controversy requirement of Article III of the Constitution.

These arguments miss the point. The gravamen of plaintiffs' complaint is that an act of Congress is unconstitutional *on its face*. To support this claim, they have engaged in substantial discovery which has produced large volumes of material concerning Congressional mailing operations under the statute. Indeed, plaintiffs further discovery requests are being objected to as massive and burdensome.

More than five years ago, this court rejected an argument closely related to the one the Senate now advances: that plaintiffs should have been required to exhaust their remedies with the appropriate congressional committees before bringing this action. We ruled then and hold now that plaintiffs have no duty to bring their claims before these committees. These committees, as tribunals, have no power to grant the relief they seek, *i.e.*, a declaration of the invalidity of an Act of Congress. *See* Memorandum and Order of February 10, 1975, at 2. Where plaintiffs have no duty to exhaust, and where they assert that the existence and operation of the statute violates their First Amendment rights on a recurring basis, their claims are ripe for adjudication by this court.

The Senate's second contention is that Common Cause's cause of action concerning the franking of campaign literature is moot, because the Senate has adopted a rule forbidding such use of the frank. This argument is utterly devoid of merit, for it is axiomatic that a Senate rule does not amend a statute, and that the Senate may change its rules anytime it chooses. Indeed, it has been asserted by statute that it is "the constitutional right of either House to change the rules . . . at any time . . . ." 5 U.S.C. § 908(2) (Supp. III 1979). Even if we were to accept the Senate's argument that this claim was moot under the new rule, the Senate's rulemaking power would make this issue "capable of repetition yet evading review," thus warranting decision. *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

For the foregoing reasons, the motions to dismiss this action are denied.

An order consistent with the foregoing has been entered this day.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

vs.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON
CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant,

and

UNITED STATES SENATE,
Amicus Curiae.

Filed Dec. 11, 1980

ORDER

Upon consideration of the motions to dismiss filed by defendants for lack of standing and on prudential grounds, and consideration of the various memoranda and replies filed by intervenor, defendants, plaintiffs, and *amicus curiae*, it is by the court this 10th day of December, 1980,

ORDERED that the motions to dismiss this action for lack of standing are denied with prejudice.

/s/ Malcolm R. Wilkey (by JHP)
United States Circuit Judge

/s/ John H. Pratt
United States District Judge

/s/ George L. Hart, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

E. T. KLASSEN, *et al.*,
Defendants.

Filed Feb. 10, 1975

MEMORANDUM AND ORDER

This action challenges the facial constitutionality of the Congressional franking privilege and seeks declaratory and injunctive relief enjoining the enforcement and execution of 39 U.S.C. § 3210. Defendants filed a motion to dismiss, which was denied by a single Judge of this panel, and the matter comes before this Court upon defendants' renewed motion to dismiss.

The grounds of the motion to dismiss are (1) non-joinder of indispensable parties and misjoinder of defendants, (2) failure to exhaust administrative remedies, and (3) lack of standing.

With respect to the claim concerning non-joinder of parties, we hold that Congress or the membership of Congress are not indispensable parties for several reasons. First, the joinder of such parties is not necessary for the granting of relief sought by plaintiffs. Second, the mere fact that Congress and its members are beneficiaries of the present franking privilege does not make them indispensable parties, as is witnessed by the long list of cases covering acts of Congress held unconstitutional without

the joinder of beneficiaries of such legislation. Finally, Congress and its members have notice of this litigation and are always free to move to intervene. Respecting misjoinder, the Secretary of the Treasury and the Postmaster General are properly joined in view of the relief requested in the complaint.

The claim that plaintiffs have not exhausted their administrative remedies in failing to file complaints concerning violations of the statute with the House Commission on Congressional Mailing Standards or the Select Commitee on Standards and Conduct of the Senate has no merit. Plaintiffs make no contention that there have been abuses or violations of the statute, consideration of which are in the sole jurisdiction of the House Commission or the Senate Committee, but rather that the statute on its face is unconstitutional, a matter beyond the jurisdiction of such bodies. Obviously, the House Commission and Senate Committee have no power to declare an act of Congress unconstitutional. It is well settled that the doctrine of exhaustion does not apply where the administrative process is inadequate to dispose of the constitutional claim. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752 (1947).

Defendants' principal claim that plaintiffs lack standing, particularly in the light of two recent Supreme Court decisions, *Richardson* [1] and *Reservists Committee to Stop the War*,[2] is more serious and requires exploration into an area whose precise bounds and limits have not been defined with an overabundance of clarity. An examination of the cases preceding and following the Supreme Court's decision in the lead case of *Flast* v. *Cohen*, 392 U.S. 83 (1968), indicates that the Court appears to have fashioned a test of standing consisting fundamentally of two steps.

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[1] 42 U.S. Law Week 5076 (1974).

[2] 42 U.S. Law Week 5008 (1974).

First, the action complained of must have caused plaintiffs an injury in fact, economic or otherwise. This is to insure that the plaintiffs have such personal stake and interest in the matter as will impart the concrete adverseness and sharpness required by the "case or controversy" provision of the Constitution. *Flast* v. *Cohen*, *supra*, at 99; *see also Baker* v. *Carr*, 369 U.S. 186, 204 (1962); *Association of Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

Second, there must be a logical link between the interests which plaintiffs seek to protect and the type of legislative enactment being attacked or a nexus between the injury suffered and the constitutional infringement alleged. *Flast* v. *Cohen*, *supra*, p. 102; *Association of Data Processing Organizations, Inc.* v. *Camp*, *supra*, pp. 153-154. In *Flast*, the plaintiff was a taxpayer who was held to have standing to challenge only "exercises of congressional power under the taxing and spending power of Art. I, § 8 of the Constitution." While *Flast* on its facts establishes federal taxpayer standing in Establishment Clause cases, it cannot be limited to such cases alone.

In the present case, plaintiffs' claim of injury is much broader. Plaintiffs sue as taxpayers with a taxable income of over $6 billion annually and federal tax liability in excess of $1 billion each year. They assert that federal funds appropriated under the franking privilege are being used to finance the distribution of partisan political literature specifically authorized by Section 3210 and that such expenditures of federal funds violate the limitations upon the taxing and spending power of Congress under Article I, Section 8, and contravene the First and Fifth Amendments of the Constitution.

Just as importantly, plaintiffs claim status as registered voters, candidates for Congressional office, and supporters of candidates. It is alleged that over fifty members of Common Cause challenged incumbent members of Congress in the last election and many of its members

supported challengers to incumbents. They assert that the present franking privilege confers substantial political benefits upon incumbents, while non-incumbent challengers and their supporters do not have the same advantage. As a result, the rights of challengers and their supporters to freely associate for political purposes is impaired, and the value of their votes is diluted and diminished, all in violation of the First Amendment. *Baker* v. *Carr, supra.* In addition, it is alleged that this practice invidious discriminates in favor of incumbent members in violation of the due process clause of the Fifth Amendment. In short, as citizens with a particularized interest in the electoral process, plaintiffs claim standing to attack Section 3210 as violative of their constitutional rights.

From the foregoing brief discussion, it is clear to us that the plaintiffs have met the test laid down in *Flast* and subsequent cases. They have asserted (1) an injury in fact, not a generalized complaint common to all citizens and taxpayers, and they have demonstrated (2) a nexus between the injuries suffered and the constitutional infringements alleged.

The recent Supreme Court decisions in *Richardson, supra,* and *Reservists Committee to Stop the War, supra,* reaffirm *Flast.* In *Richardson,* a single taxpayer was held not to have standing, not only because he did not bring his suit as a violation of Article I, Section 8, but because there was no nexus between his status as a taxpayer and the failure of Congress to require the Executive to make a verified report of CIA expenditures. In *Reservists Committee to Stop the War, supra,* the respondents suing as a class were denied standing as citizens to challenge the Incompatibility Clause of Article I, Section 6, clause 2, because their claim of injury was held to represent the generalized interest of all citizens in adherence to constitutional requirements and to lack concreteness necessary to meet the case or controversy limitations of Article III. The new cases are of no help to the defendants.

In the light of the foregoing discussion and for the reasons set forth, it is by the Court this 10th day of February, 1975,

ORDERED, that defendants' renewed motion to dismiss be and the same is hereby denied.

/s/ Malcolm R. Wilkey
MALCOLM R. WILKEY
United States Circuit Judge

/s/ William B. Jones
WILLIAM B. JONES
United States District Judge

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

Three-Judge Court

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON
CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Common Cause and John W. Gardner, plaintiffs in the above-captioned action, appeal to the Supreme Court of the United States from the order, entered on September 8, 1982, that denied plaintiffs' motion for summary judgment, granted the motions of defendants and intervening defendant for summary judgment, and dismissed the action.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Ellen G. Block
ELLEN G. BLOCK

COMMON CAUSE
2030 M Street, NW
Washington, DC 20036
(202) 833-1200
Attorney for Plaintiffs

Dated: November 8, 1982

APPENDIX E

The Congressional Franking Act of 1973 as amended by Public Law 97-69

39 U.S.C. § 3210: Franked mail transmitted by the Vice President, Members of Congress, and congressional officials

(a) (1) It is the policy of the Congress that the privilege of sending mail as franked mail shall be established under this section in order to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States.

(2) It is the intent of the Congress that such official business, activities, and duties cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally or to the functioning, working, or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the requesting of the views of the public, or the views and information of other authority of government, as a guide or a means of assistance in the performance of those functions.

(3) It is the intent of the Congress that mail matter which is frankable specifically includes, but is not limited to—

(A) mail matter to any person and to all agencies and officials of Federal, State, and local governments regarding programs, decisions, and other related matters of public concern or public service, including any matter relating to actions of a past or current Congress;

(B) the usual and customary congressional newsletter or press release which may deal with such matters as the impact of laws and decisions on State and local governments and individual citizens; reports on

public and official actions taken by Members of Congress; and discussions of proposed or pending legislation or governmental actions and the positions of the Members of Congress on, and arguments for or against, such matters;

(C) the usual and customary congressional questionnaire seeking public opinion on any law, pending or proposed legislation, public issue, or subject;

(D) mail matter dispatched by a Member of Congress between his Washington office and any congressional district offices, or between his district offices;

(E) mail matter directed by one Member of Congress to another Member of Congress or to representatives of the legislative bodies of State and local governments;

(F) mail matter expressing congratulations to a person who has achieved some public distinction;

(G) mail matter, including general mass mailings, which consists of Federal laws, Federal regulations, other Federal publications, publications purchased with Federal funds, or publications containing items of general information;

(H) mail matter which consists of voter registration or election information or assistance prepared and mailed in a nonpartisan manner;

(I) mail matter which constitutes or includes a biography or autobiography of any Member of, or Member-elect to, Congress or any biographical or autobiographical material concerning such Member or Member-elect or the spouse or other members of the family of such Member or Member-elect, and which is so mailed as a part of a Federal publication or in

response to a specific request therefor and is not included for publicity purposes in a newsletter or other general mass mailing of the Member or Member-elect under the franking privilege; or

(J) mail matter which contains a picture, sketch, or other likeness of any Member or Member-elect and which is so mailed as a part of a Federal publication or in response to a specific request therefor and, when contained in a newsletter or other general mass mailing of any Member or Member-elect, is not of such size, or does not occur with such frequency in the mail matter concerned, as to lead to the conclusion that the purpose of such picture, sketch, or likeness is to advertise the Member or Member-elect rather than to illustrate accompanying text.

(4) It is the intent of the Congress that the franking privilege under this section shall not permit, and may not be used for, the transmission through the mails as franked mail, of matter which in its nature is purely personal to the sender or to any other person and is unrelated to the official business, activities, and duties of the public officials covered by subsection (b) (1) of this section.

(5) It is the intent of the Congress that a Member of or Member-elect to Congress may not mail as franked mail—

(A) mail matter which constitutes or includes any article, account, sketch, narration, or other text laudatory and complimentary of any Member of, or Member-elect to, Congress on a purely personal or political basis rather than on the basis of performance of official duties as a Member or on the basis of activities as a Member-elect;

(B) mail matter which constitutes or includes—

(i) greetings from the spouse or other members of the family of such Member or Member-

elect unless it is a brief reference in otherwise frankable mail;

(ii) reports of how or when such Member or Member-elect, or the spouse or any other member of the family of such Member or Member-elect, spends time other than in the performance of, or in conection with, the legislative, representative, and other official functions of such Member or the activities of such Member-elect as a Member-elect; or

(iii) any card expressing holiday greetings from such Member or Member-elect; or

(C) mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office.

(6)(A) It is the intent of Congress that a Member of, or Member-elect to, Congress may not mail any mass mailing as franked mail—

(i) if the mass mailing is mailed fewer than 60 days immediately before the date of any primary election or general election (whether regular, special, or runoff) in which the Member is a candidate for reelection; or

(ii) in the case of a Member of, or Member-elect to, the House who is a candidate for any other public office, if the mass mailing—

(I) is prepared for delivery within any portion of the jurisdiction of or the area covered by the public office which is outside the area constituting the congressional district from which the Member or Member-elect was elected; or

(II) is mailed fewer than 60 days immediately before the date of any primary election or gen-

eral election (whether regular, special, or runoff) in which the Member or Member-elect is a candidate for any other public office.

(B) Any mass mailing which is mailed by the chairman of any organization referred to in the last sentence of section 3215 of this title which relates to the normal and regular business of the organization may be mailed without regard to the provisions of this paragraph.

(C) No Member of the Senate may mail any mass mailing as franked mail if such mass mailing is mailed fewer than 60 days immediately before the date of any primary election or general election (whether regular, special, or runoff) for any national, State or local office in which such Member is a candidate for election.

(D) The Select Committee on Ethics of the Senate and the House Commission on Congressional Mailing Standards shall prescribe for their respective Houses rules and regulations, and shall take other action as the Committee or the Commission considers necessary and proper for Members and Members-elect to comply with the provisions of this paragraph and applicable rules and regulations. The rules and regulations shall include provisions prescribing the time within which mailings shall be mailed at or delivered to any postal facility and the time when the mailings shall be deemed to have been mailed or delivered to comply with the provisions of this paragraph.

(E) For purposes of this section, the term "mass mailing" means newsletters and similar mailings of more than five hundred pieces in which the content of the matter mailed is substantially identical but shall not apply to mailings—

(i) which are in direct response to communications from persons to whom the matter is mailed;

(ii) to colleagues in the Congress or to government officials (whether Federal, State, or local); or

(iii) of news releases to the communications media.

(b) (1) The Vice President, each Member of or Member-elect to Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, each of the elected officers of the House of Representatives (other than a Member of the House), the Legislative Counsels of the House of Representatives and the Senate, and the Senate Legal Counsel, may send, as franked mail, matter relating to their official business, activities, and duties, as intended by Congress to be mailable as franked mail under subsection (a) (2) and (3) of this section.

(2) If a vacancy occurs in the Office of the Secretary of the Senate, the Sergeant at Arms of the Senate, an elected officer of the House of Representatives (other than a Member of the House), the Legislative Counsel of the House of Representatives or the Senate, or the Senate Legal Counsel, any authorized person may exercise the franking privilege in the officer's name during the period of the vacancy.

(3) The Vice President, each Member of Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, and each of the elected officers of the House (other than a Member of the House), during the 90-day period immediately following the date on which they leave office, may send, as franked mail, matter on official business relating to the closing of their respective offices. The House Commission on Congressional Mailing Standards and the Select Committee on Standards and Conduct of the Senate shall prescribe for their respective Houses such rules and regulations, and shall take such other action as the Commission or Committee considers necessary and proper, to carry out the provisions of this paragraph.

(c) Franked mail may be in any form appropriate for mail matter, including, but not limited to, correspondence, newsletters, questionnaires, recordings, facsimiles, re-

prints, and reproductions. Franked mail shall not include matter which is intended by Congress to be nonmailable as franked mail under subsection (a)(4) and (5) of this section.

(d)(1) A Member of Congress may mail franked mail with a simplified form of address for delivery—

(A) within that area constituting the congressional district or State from which he was elected; and

(B) with respect to a Member of the House of Representatives on and after the date on which the proposed redistricting of congressional districts in his State by legislative or judicial proceedings is initially completed (whether or not the redistricting is actually in effect), within any additional area of each congressional district proposed or established in such redistricting and containing all or part of the area constituting the congressional district from which he was elected, unless and until the congressional district so proposed or established is changed by legislative or judicial proceedings.

(2) A Member-elect to the Congress may mail franked mail with a simplified form of address for delivery within that area constituting the congressional district or the State from which he was elected.

(3) A Delegate, Delegate-elect, Resident Commissioner, or Resident Commissioner-elect to the House of Representatives may mail franked mail with a simplified form of address for delivery within the area from which he was elected.

(4) Any franked mail which is mailed under this subsection shall be mailed at the equivalent rate of postage which assures that the mail will be sent by the most economical means practicable.

(5) The Senate Committee on Rules and Administration and the House Commission on Congressional Mailing

Standards shall prescribe for their respective Houses rules and regulations governing any franked mail which is mailed under this subsection and shall by regulation limit the number of such mailings allowed under this subsection.

(6) (A) Any Member of, or Member-elect to, the House of Representatives entitled to make any mailing as franked mail under this subsection shall, before making any mailing, submit a sample or description of the mail matter involved to the House Commission on Congressional Mailing Standards for an advisory opinion as to whether the proposed mailing is in compliance with the provisions of this subsection.

(B) The Senate Select Committee on Ethics may require any Member of, or Member-elect to, the Senate entitled to make any mailings as franked mail under this subsection to submit a sample or description of the mail matter to the Committee for an advisory opinion as to whether the proposed mailing is in compliance with the provisions of the subsection.

(7) Franked mail mailed with a simplified form of address under this subsection—

(A) shall be prepared as directed by the Postal Service; and

(B) may be delivered to—

(i) each box holder or family on a rural or star route;

(ii) each post office box holder; and

(iii) each stop or box on a city carrier route.

(8) For the purposes of this subsection, a congressional district includes, in the case of a Representative at Large or Representative at Large-elect, the State from which he was elected.

(e) The frankability of mail matter shall be determined under the provisions of this section by the type and content of the mail sent, or to be sent.

(f) Any mass mailing which otherwise would be permitted to be mailed as franked mail under this section shall not be so mailed unless the cost of preparing and printing the mail matter is paid exclusively from funds appropriated by Congress, except that an otherwise frankable mass mailing may contain, as an enclosure or supplement, any public service material which is purely instructional or informational in nature, and which in content is frankable under this section.

(g) Notwithstanding any other provision of Federal, State, or local law, or any regulation thereunder, the equivalent amount of postage determined under section 3216 of this title on franked mail mailed under the frank of the Vice President or a Member of Congress, and the cost of preparing or printing such frankable matter for such mailing under the frank, shall not be considered as a contribution to, or an expenditure by, the Vice President or a Member of Congress for the purpose of determining any limitation on expenditures or contributions with respect to any such official, imposed by any Federal, State, or local law or regulation, in connection with any campaign of such official for election to any Federal office.

2 U.S.C. § 501: House Commission on Congressional Mailing Standards—Establishment; designation

(a) There is established a special commission of the House of Representatives, designated the "House Commission on Congressional Mailing Standards" (herein referred to as the "Commission").

(b) The Commission shall be composed of six Members appointed by the Speaker of the House, three from the majority political party, and three from the minority po-

litical party, in the House. The Speaker shall designate as Chairman of the Commission, from among the members of the Committee on Post Office and Civil Service of the House, one of the Members appointed to the Commission. A vacancy in the membership of the Commission shall be filled in the same manner as the original appointment. Four members of the Commission shall constitute a quorum to do business.

(c) In performing its duties and functions, the Commission may use such personnel, office space, equipment, and facilities of, and obtain such other assistance from, the Committte on Post Office and Civil Service of the House, as such committee shall make available to the Commission. Such personnel and assistance shall include, in all cases, the services and assistance of the chief counsel or other head of the professional staff (by whatever title designated) of such committee. All assistance so furnished to the Commission by the Committee on Post Office and Civil Service shall be sufficient to enable the Commission to perform its duties and functions efficiently and effectively.

(d) The Commission shall provide guidance, assistance, advice, and counsel, through advisory opinions or consultations, in connection with the mailing or contemplated mailing of franked mail under section 3210, 3211, 3212, 3213(2), 3218, or 3219. In connection with the operation of section 3215, of Title 39, and in connection with any other Federal law (other than any law which imposes any criminal penalty) or any rule of the House of Representatives relating to franked mail, upon the request of any Member of the House or Member-elect, Resident Commissioner or Resident Commissioner-elect, Delegate or Delegate-elect, any former Member of the House or former Member-elect, Resident Commissioner or Resident Commissioner-elect, Delegate or Delegate-elect, any surviving spouse of any of the foregoing (or any individual designated by the Clerk of the House under section 3218

of Title 39), or any other House official or former House official, entitled to send mail as franked mail under any of those sections. The Commission shall prescribe regulations governing the proper use of the franking privilege under those sections by such persons.

(e) Any complaint by any person that a violation of any section of Title 39 referred to in subsection (d) of this section (or any other Federal law which does not include any criminal penalty or any rule of the House of Representatives relating to franked mail) is about to occur, or has occurred within the immediately preceding period of one year, by any person referred to in such subsection (d), shall contain pertinent factual material and shall conform to regulations prescribed by the Commission. The Commission, if it determines there is reasonable justification for the complaint, shall conduct an investigation of the matter, including an investigation of reports and statements filed by the complainant with respect to the matter which is the subject of the complaint. The Commission shall afford to the person who is the subject of the complaint due notice and, if it determines that there is substantial reason to believe that such violation has occurred or is about to occur, opportunity for all parties to participate in a hearing before the Commission. The Commission shall issue a written decision on each complaint under this subsection not later than thirty days after such a complaint has been filed or, if a hearing is held, not later than thirty days after the conclusion of such hearing. Such decision shall be based on written findings of fact in the case by the Commission. Such findings of fact by the Commission on which its decision is based are binding and conclusive for all judicial and administrative purposes, including purposes of any judicial challenge or review. Any judicial review of such decision, if ordered on any ground, shall be limited to matters of law. If the Commission finds in its written decision, that a serious and willful violation has occurred or

is about to occur, it may refer such decision to the Committee on Standards of Official Conduct of the House of Representatives for appropriate action and enforcement by the committee concerned in accordance with applicable rules and precedents of the House and such other standards as may be prescribed by such committee. In the case of a former Member of the House or a former Member-elect, a former Resident Commissioner or Delegate or Resident Commissioner-elect or Delegate-elect, any surviving spouse of any of the foregoing (or any individual designated by the Clerk of the House under section 3218 of Title 39), or any other former House official, if the Commission finds in its written decision that any serious and willful violation has occurred or is about to occur, then the Commission may refer the matter to any appropriate law-enforcement agency or official for appropriate remedial action. Notwithstanding any other provision of law, no court or administrative body in the United States or in any territory thereof shall have jurisdiction to entertain any civil action of any character concerning or related to a violation of the franking laws or an abuse of the franking privilege by any person listed under subsection (d) of this section as entitled to send mail as franked mail, except judicial review of the decisions of the Commission under this subsection. The Commission shall prescribe regulations for the holding of investigations and hearings, the conduct of proceedings, and the rendering of decisions under this subsection providing for equitable procedures and the protection of individual, public, and Government interests. The regulations shall, insofar as practicable, contain the substance of the administrative procedure provisions of sections 551-559, and 701-706, of Title 5. These regulations shall govern matters under this subsection subject to judicial review thereof.

(f) The Commission may sit and act at such places and times during the sessions, recesses, and adjourned periods of Congress, require by subpena or otherwise the

attendance of such witnesses and the production of such books, papers, and documents, administer such oaths and affirmations, take such testimony, procure such printing and binding, and make such expenditures, as the Commission considers advisable. The Commission may make such rules respecting its organization and procedures as it considers necessary, except that no action shall be taken by the Commission unless a majority of the Commission assent. Subpenas may be issued over the signature of the Chairman of the Commission or of any member designated by him or by the Commission, and may be served by such person or persons as may be designated by such Chairman or member. The Chairman of the Commission or any member thereof may administer oaths or affirmations to witnesses.

(g) The Commission shall keep a complete record of all its actions, including a record of the votes on any question on which a record vote is demanded. All records, data, and files of the Commission shall be the property of the Commission and shall be kept in the offices of the Commission or such other places as the Commission may direct.

2 U.S.C. § 502: Select Committee on Standards and Conduct of the Senate—Advisory opinions or consultations respecting franked mail for persons entitled to franking privilege; franking privilege regulations

(a) The Select Committee on Standards and Conduct of the Senate shall provide guidance, assistance, advice and counsel, through advisory opinions or consultations, in connection with the mailing or contemplated mailing of franked mail under section 3210, 3211, 3212, 3213(2), 3218, or 3219, and in connection with the operation of section 3215, of Title 39 upon the request of any Member of the Senate or Member-elect, surviving spouse of any of the foregoing or other Senate official, entitled to send

mail as franked mail under any of those sections. The select committee shall prescribe regulations governing the proper use of the franking privilege under those sections by such persons.

(b) Any complaint filed by any person with the select commitee that a violation of any section of Title 39 referred to in subsection (a) of this section is about to occur or has occurred within the immediately preceding period of one year, by any person referred to in such subsection (a), shall contain pertinent factual material and shall conform to regulations prescribed by the select committee. The select committee, if it determines there is reasonable justification for the complaint, shall conduct an investigation of the matter, including an investigation of reports and statements filed by the complainant with respect to the matter which is the subject of the complaint. The committee shall afford to the person who is the subject of the complaint due notice and, if it determines that there is substantial reason to believe that such violation has occurred or is about to occur, opportunity for all parties to participate in a hearing before the select committee. The select committee shall issue a written decision on each complaint under this subsection not later than thirty days after such a complaint has been filed or, if a hearing is held, not later than thirty days after the conclusion of such hearing. Such decision shall be based on written findings of fact in the case by the select committee. If the select committee finds, in its written decision, that a violation has occurred or is about to occur, the committee may take such action and enforcement as it considers appropriate in accordance with applicable rules, precedents, and standing orders of the Senate, and such other standards as may be prescribed by such committee.

(c) Notwithstanding any other provision of law, no court or administrative body in the United States or in any territory thereof shall have jurisdiction to entertain

any civil action of any character concerning or related to a violation of the franking laws or an abuse of the franking privilege by any person listed under subsection (a) of this section as entitled to send mail as franked mail, until a complaint has been filed with the select committee and the committee has rendered a decision under subsection (b) of this section.

(d) The select committee shall prescribe regulations for the holding of investigations and hearings, the conduct of proceedings, and the rendering of decisions under this subsection providing for equitable procedures and the protection of individual, public, and Government interests. The regulations shall, insofar as practicable, contain the substance of the administrative procedure provisions of sections 551-559 and 701-706, of Title 5. These regulations shall govern matters under this subsection subject to judicial review thereof.

(e) The select committee shall keep a complete record of all its actions, including a record of the votes on any question on which a record vote is demanded. All records, data, and files of the select committee shall be the property of the Senate and shall be kept in the offices of the select committee or such other places as the committee may direct.

No. 82-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMON CAUSE, *et al.*,
Appellants,

v.

WILLIAM F. BOLGER, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Of Counsel:
EDWIN M. ZIMMERMAN
WILLIAM H. ALLEN
VIRGINIA G. WATKIN
MICHAEL J. COURSEY
COVINGTON & BURLING
Washington, D.C.

JOHN VANDERSTAR
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5540
Counsel of Record for House Commission on Congressional Mailing Standards

April 8, 1983

QUESTIONS PRESENTED

1. Whether the statute that currently embodies the longstanding privilege of Members of Congress to send their letters and other communications on official business through the mail without personally paying postage is unconstitutional because some official communications sent by a Member under the congressional frank to his or her constituents may have the effect of benefiting the Member's campaign for reelection.

2. Where over a period of years Congress has closely monitored the use of the frank by its Members, and where Congress has forbidden some uses and restricted other uses so as to minimize undue electoral benefit to Members while not unduly limiting communication between Members and their constituents, whether the judiciary should intervene to direct different restrictions on the use of the frank so as to strike a different balance between permitted and forbidden uses.*

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* If probable jurisdiction is noted, this appellee will also argue the following question, which the district court decided preliminarily in favor of appellants but reserved in the final opinion on the merits:

3. Whether a membership organization, whose members include a few candidates for the House or the Senate who ran unsuccessfully against incumbents and some supporters of such candidates, and an officer of the organization who has not run and does not claim any intention to run against an incumbent for a congressional office, have standing to challenge the constitutionality of the congressional frank.

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On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

The House Commission on Congressional Mailing Standards, which intervened as a defendant below, moves that the Court affirm the decision below without further proceedings.

JURISDICTION

The notice of appeal may not have been timely filed. The order appealed from was dated September 2 and was filed with the clerk on September 7 (J.S. App. 1a, 27a, 28a), although the judgment was not entered on the docket by the clerk until September 8. Only if the time to appeal began to run from the latter date was the November 8 notice of appeal timely.

Most statutes and rules expressly state that the time to appeal begins to run upon "entry" of the judgment or decree that is the subject of the appeal. *See, e.g.*, 28 U.S.C. § 2101(a), (c); Sup. Ct. R. 11.1; Fed. R. App. P. 4. The statutory provision pertinent here, however, does not speak of "entry" but instead states that the time period runs "from the judgment, order or decree, appealed from . . . ." 28 U.S.C. § 2101(b).[1] Presumably, therefore, the date of "entry" is not the critical date under this provision and hence is not the critical date for this appeal.[2] If that is so, the appeal should be dismissed for lack of jurisdiction.

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[1] The full text of § 2101(b) is as follows:

> Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

[2] There appears to be no case in point. Burns v. Richardson, 384 U.S. 73 (1966), was a reapportionment case in which the appeal time was also governed by 28 U.S.C. § 2101(b). The district court had issued its opinion on February 17, 1965, declaring part of Hawaii's apportionment plan unconstitutional and directing the legislature to hold a special election to determine whether there should be a convention to amend Hawaii's constitution on this subject. The court retained jurisdiction for all purposes. This order was not entered until April 9. Meanwhile, on March 9, the court had suspended the February 17 order and instead required the legislature to enact three separate statutes, including an interim reapportionment plan. A new plan was adopted by the legislature and submitted to the court, and by opinion and order both dated and entered on April 28, the district court disapproved the plan and issued certain other directives to the legislature. Notices of appeal were filed on May 3 and 7. This Court held that the notices were timely filed. One alternative basis for the holding was that the February 17 order was "not finally made effective until the decision of April 28," a point that is not pertinent in this case. The Court also said that the appeal was timely if "judged by the date of entry," citing United States v. Hark, 320 U.S. 531 (1944). *Hark*, however, did not choose the date of entry in preference to the filing date or to the date a decision was rendered. Instead, it involved an

COUNTERSTATEMENT OF THE CASE

Congress has authorized its Members to send official mail under the frank, without personally paying postage, and it has carefully limited the use of the frank so as to minimize the electoral benefit a Member might receive from that use. Appellants, who were plaintiffs below, asked a three-judge district court to declare the franking statute unconstitutional and to enjoin its implementation unless additional restrictions were imposed. The court thought it "obvious" that "a perfect line" between the official and the electoral cannot be drawn (J.S. App. 24a) and rejected the constitutional claim. On that ground, and also because it did not wish to be drawn into writing detailed rules of behavior for a coordinate branch of government, the court refused to grant appellants any relief. Appellants ask this Court to conduct a plenary review of this decision and renew their request that the judiciary direct Congress to try to draw that "perfect line." (J.S. 16-19) Appellee House Commission on Congressional Mailing Standards urges instead that the lower court decision be affirmed without further briefing or oral argument.

The Congressional Frank

The history of the frank dates back to the English House of Commons in the 17th Century. Except for a period in the late 1800s, the Congress has always authorized official mail to be sent under the frank. (J.S. App. 3a-4a)

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appeal under the Criminal Appeals Act from a district court decision quashing an indictment. The district court had issued an opinion on March 5 stating that the motion was granted, and the clerk made a notation to that effect on the same day. The court then, on March 31, signed a formal order granting the motion (which was entered the same day), and this Court held that the latter order started the appeal time running. Thus, neither of these cases answers the jurisdictional question posed in the present case.

As enacted in 1895, the franking statute authorized Members of Congress to use the frank on "official business." Guidance on the meaning of this key phrase was provided by the Post Office Department, which issued advisory opinions upon request. In 1968, however, the Department ceased giving opinions to members of the public, and in 1971 it relinquished entirely its responsibilities in this area. (*Id.* 4a)

Litigants then asked federal courts to assume these responsibilities. (*Id.*) Individuals running against incumbents in the 1972 congressional elections filed lawsuits in district courts in four different circuits. They claimed that the incumbents were sending mail under the frank that was not "official business." Disparate decisions resulted.[3]

In order to substitute a more orderly, centralized system of regulation, Congress in 1973 enacted a new franking statute, Pub.L. 93-191, 39 U.S.C. §§ 3201, 3210-19, which had been authored by Congressman Morris K. Udall. (*Id.* 4a-5a) The term "official business" was preserved as the standard for lawful use of the frank, and the 1973 Act defined that term in detail, including a list of specific types of mailings that are and are not considered "official business." Thus, "official business" is defined generally to cover "the legislative process" and "congressional representative functions," as well as "the functioning, working, or operating of the Congress." 39 U.S.C. § 3210(a)(2). Considered frankable are such items as the "usual and customary congressional news-

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[3] Schiaffo v. Helstoski, 350 F. Supp. 1076 (D.N.J. 1972), *aff'd in part*, 492 F.2d 413 (3d Cir. 1974); Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973); Levy v. Abzug, 355 F. Supp. 1299 (S.D.N.Y. 1972); Belardino v. Murphy, 364 F. Supp. 1223 (S.D.N.Y. 1972); Bowie v. Williams, 351 F. Supp. 628 (E.D. Pa. 1972); Van Hecke v. Reuss, 350 F. Supp. 21 (E.D. Wis. 1972); Rising v. Brown, 313 F. Supp. 824 (C.D. Cal. 1970); Straus v. Gilbert, 293 F. Supp. 214 (S.D.N.Y. 1968).

letter or press release," the "usual and customary congressional questionnaire," and voter registration information. *Id.* § 3210(a)(3)(B), (C), (H). Considered *not* frankable are personal or electoral mailings such as reports on how the Member's spouse or family spends time (other than in connection with official functions) and mail that solicits political support. *Id.* §§ 3210(a)(4) & (5)(B)(ii), (C).[4]

Even some mailings on official business may not be sent under the frank. The Act imposed a blackout on the initiation of *any* franked mass mailings—defined as substantially identical mailings to 500 or more persons[5]—during a 28-day period immediately preceding any primary or general election in which the Member is a candidate for reelection.[6] In 1977, each house adopted a rule extending these blackout periods to 60 days. This means that a Member who runs in both a primary and a general election may not send any mass mailings under the frank in an election year—which is every other year for House Members—for four of the ten months that precede the general election.[7] In 1981, this 60-day blackout rule, together with other limitations in the House and Senate rules, was made part of the statute.[8]

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[4] The details are summarized by the district court at J.S. App. 5a-7a; the 1973 Act, as amended, is set forth at J.S. App. 55a-69a.

[5] 39 U.S.C. § 3210(a)(6)(E); J.S. App. 59a-60a.

[6] 39 U.S.C. § 3210(a)(5)(D) (prior to amendment; *see infra*).

[7] House Rule XLVI, adopted March 2, 1977, in H.Res. 287; Senate Rule 48(3), adopted as Rule XLVIII April 1, 1977, in S.Res. 110. (J.S. App. 9a)

[8] Pub. L. No. 97-69, 95 Stat. 1041 (1981), adding a new paragraph 6 to 39 U.S.C. § 3210(a) (60-day blackout rule); *see* J.S. App. 58a-60a. Another change had to do with whether mail could be franked when the cost of printing it is paid by campaign funds: The 1973 Act allowed this but the rules prohibited it (J.S. App. 9a), and the 1981 amendment made this restriction part of the statute (39 U.S.C. § 3210(f); J.S. App. 63a).

The 1973 Act also designated official bodies in both houses to police use of the frank. In the House of Representatives that body is the House Commission on Congressional Mailing Standards (*see* 2 U.S.C. § 501; J.S. App. 63a-67a), generally known as the Franking Commission, which has at all times been under the chairmanship of Congressman Udall, the author of the legislation. The Commission has issued detailed regulations supplementing the 1973 Act.[9] The Commission also holds briefings and, by means of informal advice and advisory opinions, otherwise assists Members and their staffs in understanding what types of material may and may not be mailed under the frank. (J.S. App. 8a-9a) Indeed, no mass mailing may be sent under the frank by a Member of the House using the postal patron form of address unless the mailing is first reviewed by the Commission.[10] Additionally, anyone who believes a particular mailing violates the law or the regulations may file a complaint with the Commission, which then conducts an investigation and, if appropriate, holds a hearing.[11] Members of the House have from time to time reimbursed the Treasury for the postage incurred by particular mailings as a result of such proceedings.[12]

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[9] *House Commission on Congressional Mailing Standards, Regulations on the Use of the Congressional Frank By Members of the House of Representatives and Rules of Practice in Proceedings Before the House Commission on Congressional Mailing Standards* (cited at J.S. App. 9a n.7) [hereafter *Franking Commission Regulations*].

[10] House Rule XLVI. This was also made part of the statute by the 1981 amendment. *See* 39 U.S.C. § 3210(d)(6)(A); J.S. App. 62a.

[11] J.S. App. 8a; *see Franking Commission Regulations* at pp. 29-46.

[12] Aff. of Cong. Udall, at p. 9 (May 20, 1981).

The Proceedings Below

Common Cause and its founder filed this lawsuit on October 5, 1973, shortly after the two houses of Congress had passed slightly different versions of the bill that would, in December, become the 1973 Act. Although Common Cause had testified on the bill, its October suit referred only to the pre-1973 franking law; it claimed that certain uses of the frank were allegedly not on "official business" and therefore were not authorized. Once the 1973 Act became law, the plaintiffs filed an amended complaint seeking "judicial review" of the 1973 Act. They claimed that it violated the First and Fifth Amendments and the General Welfare Clause of Article I, Section 8, of the Constitution. Specifically, plaintiffs claimed that the frank constitutes "extensive material assistance" which the federal government gives to incumbent Members of Congress who seek reelection, but not to their challengers. (J.S. 5) Named as defendants were the Postmaster General and the Secretary of the Treasury (the "Executive Defendants").[13] Declaratory relief was sought, together with an injunction forbidding all mass mailings under the frank and also requiring the Postmaster General to inspect all franked mail and not to honor the frank for any mail that did not meet a more stringent definition of "official business."

The Franking Commission intervened as a defendant.

A three-judge court was convened pursuant to 28 U.S.C. § 2284,[14] and extensive discovery by plaintiffs followed.[15]

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[13] The Postmaster General delivers franked mail and is paid for doing so by warrants issued by the Secretary of the Treasury.

[14] A later repeal of part of the three-judge court statute did not affect cases pending at the time of repeal. Pub. L. No. 94-381, § 7, 90 Stat. 1119 (1976).

[15] Pursuant to stipulation, all discovery material was coded to avoid identification of individual Members of Congress. (J.S. App. 3a)

(J.S. App. 2a-3a) Plaintiffs thereafter filed 570 Requests for Admissions, to which the Franking Commission and the Executive Defendants responded (as did the Senate, which participated as *amicus curiae*). (*Id.* 10a n.10) The Commission also conducted discovery. It took the depositions of 12 members of Common Cause who were identified by it as having unsuccessfully run against incumbent Senators or Members of the House.[16]

Both sides then filed motions for summary judgment, supported by briefs and masses of factual material, which included affidavits from 60 present and former Members of Congress. The Senate also submitted extensive material and a brief in support of defendants' motions. (J.S. App. 3a) The plaintiffs thereafter, at the court's request, submitted two alternate versions of the injunctive relief they sought (appended hereto).

After hearing oral argument, the three-judge district court unanimously granted the defendants' motions and dismissed the complaint. (J.S. App. 1a-29a) In its memorandum opinion, the court, after describing the 1973 Act and its background (*see* pp. 3-6, *supra*), made the following determinations:

(1) The legislative history of the 1973 Act confirms Congressman Udall's statement that the Congress was, in that statute, "simply confirming the sound, solid, re-

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[16] Other purported challengers were identified in answers to interrogatories, but these individuals did not appear for their depositions. Not a single one of the twelve challengers who did appear, much less any of the others, was able to identify in any concrete or credible way the adverse effect the incumbent's franked mailings had had on the challenger's electoral effort. One individual, who ran for the Senate against an incumbent in 1974, complained that the incumbent's use of the frank (a total of eight newsletters in 1973-74) gave him too much name recognition for the challenger to cope with, notwithstanding that the challenger had been governor of his state for two terms and spent 351 days campaigning. (Pl. Ans. to Interrog. 11.13)

sponsible use of the frank which the vast majority of Members of Congress have always followed." (J.S. 8a)

(2) Since 1973, Congress has "tightened considerably the respective features of the 1973 Act . . . ." (*Id.* 10a)

(3) It "stands to reason that incumbency alone is a valuable asset to the public official who seeks reelection," and "there is little doubt that the franking privilege is a valuable tool in facilitating the performance by individual Members of Congress of their constitutional duty to communicate with and inform their constitutents on public matters," a "duty which has justified the frank throughout its history." (*Id.* 11a) This fact plaintiffs conceded. (*Id.* 21a)

(4) Members of Congress have been advised, and some apparently believe, that franked mailings can be beneficial in promoting their reelection (*id.* 12a), and numerous Members over the years have used franked mailings with that in mind. (*Id.* 13a-14a)

(5) There appears to be "no statistical relationship between the use of the frank and the outcome of an election," and "proof of the decisive impact of the privilege in any particular election is elusive, whatever the potential financial benefit of the frank." (*Id.* 14a)[17]

(6) Because the frank has at most only an indirect impact on the plaintiffs' ability to speak, the case does not require application of strict First Amendment scrutiny. That test "is reserved for those instances where the restriction impacts *directly* on the *content* of the restricted communication." (*Id.* 17a) (Emphasis is the court's.) Indeed, said the court, the First Amendment "finds little place in our analysis." (*Id.* 19a)

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[17] Defendants challenged the plaintiffs' standing. The district court said it did not regard the issue "as a frivolous one and acknowledge[d] that there may be a legitimate concern over whether plaintiffs' limited showings are sufficient to establish standing." The court chose not to dispose of the case on that ground. (*Id.* 15a n.12)

(7) As for the equal protection argument advanced by plaintiffs, "[t]hey concede that the problem is merely one of drawing lines—striking a proper balance between legitimate and illegitimate uses of the frank." (*Id.* 21a) Plaintiffs do not complain about the granting of the franking privilege to Members of Congress only, and not to their challengers. Instead they complain that the line Congress has drawn between permitted and forbidden uses of the frank should permit less and forbid more. (*Id.*) But the line Congress has drawn is "rationally designed" to carry out "the basic principle that government funds should not be spent to help incumbents gain reelection." [18] (*Id.* 23a) It is "impossible to draw and enforce a perfect line between the official and political business of Members of Congress." (*Id.* 24a)

(8) Plaintiffs do not suggest that the frank (and other "perquisites" of office) "be strictly limited to purposes which cannot possibly contribute to efforts at reelection," which would be "a most difficult standard to administer . . . without probing into the deepest thoughts and motives of an individual Member of Congress . . . ." (*Id.*) Also, just as various types of mailings are identified by plaintiffs as suitable "for campaign purposes," every type of mailing plaintiffs challenge is "also suitable for legiti-

[18] Here the court found it pertinent to note that the evidence in the record relates primarily to examples of abuse of the frank instead of the far more prevalent routine uses. (*Id.*) In the lengthy brief and extensive statement of material facts submitted with plaintiffs' motion for summary judgment, approximately 120 newsletters and other mailings by Members of the House were identified. These were drawn from records of the Franking Commission covering a six-year period, during which House Members sent out well over 6,000 mass mailings under the frank, which means that less than 2 percent of mailings were complained about.

Interestingly, Congressman Udall observed, during the debate on what became the 1973 Act, that "[n]inety-eight percent of the material, even in an election year, that goes out of" the House "is sound, official, legal and in the public interest." 119 Cong. Rec. 11787 (1973).

mate 'official' purposes." (*Id.* 25a) Therefore, there is a "rational and legitimate basis" for the decision by Congress to make these types of mailings frankable, and the court defers to "the judgment embodied in the statute." (*Id.*)

Prudential considerations also guided the court. The 1973 Act was enacted to curb abuses of the franking privilege, and the House and Senate have taken a number of additional steps to further restrict the privilege and monitor its use. The court declined to do what plaintiffs suggested—draw a different line between permitted and forbidden uses of the frank. First, the court said, it would be "impossible" to define or delineate sharply the distinction between "official" and "unofficial" mail. Second, the court should not be in the business of issuing "rules of behavior superseding those that Congress, a coordinate branch of government, has responsibly [19] set for itself." (*Id.* 26a).

In its conclusion, the court disclaimed any suggestion that the frank could never be shown to be a "cognizable interference with important rights." It said only that the "level of impact" shown in this case is not sufficient to justify judicially directed redrawing of the lines that separate permissible from impermissible franked mailings. (*Id.* 27a)

This appeal followed.

THE QUESTIONS PRESENTED DO NOT CALL FOR PLENARY REVIEW

The franking statute is not a campaign financing law. Whatever incidental electoral benefit Members of Congress may receive by sending mail under the frank, reelection of incumbents is plainly not the objective or purpose of the frank. Instead, like its 17th Century English predecessor, the congressional frank is a means by which

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[19] This is the word used by the court. The reprint of the opinion in J.S. App. incorrectly uses the word "responsibility."

Members are enabled to carry out their constitutional duty to communicate with their constituents and the public generally on matters of public concern—on "official business." By statute, rules and otherwise, Congress has denied to its Members the use of free mailing privileges for personal purposes, including reelection, and has imposed numerous restrictions on the content of mail that is sent out under the frank. But Congress, recognizing that congressional newsletters and certain other official communications may have the additional effect of aiding a Member's reelection prospects, has done more: It has prohibited its Members from initiating *any* mass mailings under the frank—including mailings that would unquestionably qualify as official business—during the critical electoral period: 60 days prior to any primary or general election in which the Member will be a candidate. 39 U.S.C. § 3210(a)(6)(A), J.S. App. 58a-59a. Thus, if during either of these blackout periods Congress were considering or had enacted extensive changes in Social Security benefits, or if it were considering ratification of a new arms control agreement, most Members of the House and close to one-third of the Senators would be barred from using the frank to send to their constituents a newsletter discussing these matters or a questionnaire asking for their views.

The lower court could find no principle of constitutional law that supported invalidation of the frank or the substitution of elaborate, judicially dictated restrictions in place of the extensive restrictions Congress has imposed. This decision was plainly correct and in any event raises no question that warrants plenary review by this Court. There are two reasons. *First*, this case involves neither the development nor the application of any important principle of constitutional law, particularly in view of the long history of the franking privilege. *Second*, the lower court, after reviewing the extensive record, rightly decided that detailed intervention in the internal affairs of a coordinate branch of the federal government was not

warranted, in the absence of any demonstration that the congressional frank has caused harm to the electoral process.[20]

A. Neither The First Amendment Nor The Equal Protection Clause Supports Common Cause's Position.

The claim that the franking statute violates the First Amendment does not warrant plenary consideration by the Court.

The franking statute does not tell Common Cause or its members that they cannot speak or write, nor does it tell them what they may or may not say. It does not abridge their freedom or anyone else's. Thus, cases Common Cause cites (J.S. 8-9) that involve direct suppression or regulation of the content of someone's speech [21] are wholly inapposite, as are cases involving "significant encroachments" on political rights,[22] for the district court here found a complete absence of any such encroachment (J.S. App. 14a, 22a).

Instead, the purpose of the franking statute is to promote the dialogue between the citizens and their elected representatives in the national legislature. If Mr. Justice Brandeis was right when he described "the greatest

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[20] Because the plaintiffs failed to prove that any use of the frank to which they objected had caused them harm (*see* n.16 *supra*) the substantive questions would probably not be reached if the Court were to note probable jurisdiction. Although the district court twice denied motions to dismiss the amended complaint for lack of standing, once a record had been made the court reserved decision on the point, noting, however, its "legitimate concern" over the issue (*see* n.17 *supra*).

[21] Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977); Police Department v. Mosley, 408 U.S. 92 (1972).

[22] Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

menace to freedom" as "an inert people," *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), then communications between Members of Congress and their constituents are fundamental in a representative democracy. *See* The Federalist No. 56 (Madison).

On its face, therefore, the franking statute bears one important similarity to the Presidential election financing law, subtitle H of the Internal Revenue Code, that was challenged in *Buckley* v. *Valeo*, 424 U.S. 1, 85-109 (1976)—and defended by Common Cause. In rejecting the challenge, the Court said:

> "Subtitle H is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93 (footnote omitted).

"Thus," the Court continued, "Subtitle H furthers, not abridges, pertinent First Amendment values." *Id.* at 93.[23] Cf. *Jenness* v. *Fortson*, 403 U.S. 431, 438-40 (1971). The franking statute may be similarly described.

These are familiar First Amendment principles. The franking statute plainly does not violate anyone's First Amendment rights, and further briefing and argument are unnecessary.

As for Common Cause's equal protection arguments, it is important to note a major difference between the franking statute and some of the statutory provisions in-

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[23] In a footnote, the Court pointed out that

> "Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media . . . and preferential postage rates and antitrust exemptions for newspapers . . . ." *Id.* at 93 n.127.

volved in *Buckley* v. *Valeo*, on which Common Cause relies: The franking statute is not a campaign financing law. No one who has challenged an incumbent Member of Congress—and many have successfully done so in the last several elections—is forbidden by the franking statute to raise money for campaigning or is restricted in doing so, nor is anyone prevented by the franking statute from donating unlimited funds for a challenger's campaign. The statute does not undertake to finance the election campaigns of Democrats or Republicans or incumbents or anyone else, nor does it confer financial benefits only on the major parties while denying the same benefits to minor parties.[24] It simply makes the franking privilege available to Members of Congress (and certain others not pertinent here) and denies it to everyone else, not merely to those who run against Members, because no one but a Member of Congress is in a position to communicate on "official business" *as a Member of Congress.*

The consequence of this is that the equal protection cases cited by Common Cause are irrelevant. At the threshold of any equal protection case there must be a discrimination between classes of persons who are similarly situated. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963) (footnote omitted). Members of Congress communicating with their constituents on official business simply do not constitute a class that is situated similarly to all the people who are not Members of Congress, or even to the people who run for election against Members of Congress. All those people lack the special relationship to constituents that Members possess, *cf. Perry Education Ass'n* v. *Perry Local Education Ass'n*, 51 U.S.L.W. 4165 (U.S. Feb. 23, 1983);

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[24] This was the practice successfully challenged in Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980), cited at J.S. 6, 7, 9 and discussed by the court below at J.S. App. 17a-19a.

Ball v. *James*, 451 U.S. 355 (1981); *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), for they have no duty to communicate with constituents. Indeed, Common Cause has at no time sought to have the frank made available to challengers, the conventional remedy for curing an unconstitutional deprivation of a benefit.[25] *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

There is a second reason Common Cause's equal protection cases are irrelevant. The franking statute on its face, as we have seen, draws a line between Members of Congress communicating on official business and all others—plainly a reasonable distinction. Common Cause, however, claims that the statute draws a different line—between Members running for reelection and those who run against them. Even if that were a proper way to regard the statute—and we think it is not—it still would not violate the Equal Protection Clause unless Common Cause had shown a purpose to bring about the discriminatory effect of which it complains. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979); *see City of Mobile* v. *Bolden*, 446 U.S. 555 (1980); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976). But it cannot make and has not made any such showing. Surely Congress, when it reestablished the frank in 1895, was not purposefully adopting a scheme to promote the reelection prospects of incumbents. And certainly no such charge can be leveled at the 1973 Act, when Congress at once reaffirmed and circumscribed the franking privilege, particularly in light of the additional restrictions Congress

[25] There is a suggestion by Common Cause (at J.S. 17) that Congress might wish to authorize use of the frank by challengers, but Common Cause, although it has been bold indeed in proposing wide-ranging and novel judicial remedies (*see* the Proposed Order submitted to the district court, appended hereto), has never suggested that the court should have ordered such relief.

has placed on the use of the frank since 1973 in rules, regulations and the 1981 statutory amendment. Plainly, then, the need to show invidious purpose has not been satisfied. And it is not enough, under the cases, to show an intent to bring about a particular result notwithstanding its discriminatory impact. Therefore, the fact that Congress may have been aware of the possibility of electoral impact of mass mailings under the frank is insufficient to support an equal protection claim. Indeed, the steps Congress has taken to ameliorate that impact—even to the point of ordering a complete blackout on official mass mailings by candidates for reelection near the times of elections—refute any suggestion that Congress acted with a purpose to discriminate between incumbent and non-incumbent candidates.

It is therefore unnecessary even to consider what Common Cause asserts is the principal error made by the district court in its disposition of the equal protection claim —assessing the case under a "rational basis test" rather than by applying "strict scrutiny." (J.S. 9) When the allegedly favored and disfavored classes are not similarly situated and when there is no purposeful, invidious discrimination, one need not reach the question whether the rational basis test rather than the strict scrutiny test applies.

But if that question were reached, the district court decision would still be plainly correct. There are several reasons.

First, there is here no interference with the exercise of a fundamental right, which is needed to trigger "strict scrutiny" and hence a search for a compelling governmental interest.[26] The principal cases involving equal protection claims in an electoral context (cited at J.S. 9)—all of which involve state election laws—make this clear. For example, in *Williams* v. *Rhodes*, 393 U.S. 23 (1968),

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[26] There is of course no claim that a "suspect classification," such as race, is involved.

Ohio's law imposed such direct burdens on independent candidates as to make it "virtually impossible" for them to get on the ballot, *id.* at 25; the Court applied the strict scrutiny test and held the law unconstitutional. The New York law involved in *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), denied the right to vote in a school district election to anyone who did not either own property or have children in school; this too was examined under strict scrutiny and was struck down. *Bullock* v. *Carter*, 405 U.S. 134 (1972), involved candidate filing fees that ranged as high as $8,900, which the Court found had directly and adversely affected the ability of candidates to run for office; again applying strict scrutiny, the Court held the law unconstitutional. And *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979), involved a statute that allowed new political parties and independent candidates on the ballot in statewide elections if they obtained 25,000 signatures and in municipal elections if they obtained signatures of five percent of those who voted in the previous election; because this statute operated perversely in the case of Chicago and Cook County, whose population is more than twenty times 25,000, it operated to keep such candidates off the ballot in those two places even if they collected enough signatures to be on a statewide ballot, and the Court, applying strict scrutiny, found a violation of the equal protection clause.

As the Court summarized several of these cases in *Storer* v. *Brown*, 415 U.S. 724, 729 (1974), "substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect . . . ."[27] No court

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[27] Even this test does not automatically invalidate restrictive laws. In *Storer*, the Court sustained a state law that barred two of the petitioners in that case from appearing on the ballot. *See also, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974); Rosario v. Rockefeller, 410 U.S. 752 (1973); Jenness v. Fortson, 403 U.S. 431 (1971).

has ever held, however, that because there are aspects of incumbency that might improve the incumbent's reelection prospects—and the court below was not prepared to find that the frank did have any such effect (J.S. App. 14a, 22a)—there is a resulting burden on challengers that triggers the heightened standard of review applicable to laws that place major obstacles in the direct path of one who would be a candidate. In a somewhat analogous context, this Court held that granting public financing to some Presidential candidates but not to others "is not restrictive of voters' rights and less restrictive of candidates'." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 94.[28] Thus, the assessment of the franking statute under the "rational basis" test is entirely appropriate.

Second, application of a "strict scrutiny" standard to the franking statute, or to the sending of mass mailings under the frank, would not change the result. Congress is required by the Constitution itself to "keep a Journal of its Proceedings, and from time to time publish the same." (Article I, Section 5.) The object of this clause is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." *Field* v. *Clark*, 143 U.S. 649, 670-71 (1892) (quoting from Story's Commentaries). Thus, there *is* a compelling governmental interest in the congressional frank, a point so obvious that it is supported by Common Cause itself:

> "* * * plaintiffs concede that the frank serves an essential public purpose in facilitating communication with constituents and that some sort of franking privilege is necessary in the performance of official congressional business." (J.S. App. 21a)

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[28] The statute involved in *Buckley*, unlike the franking statute, created an arguable discrimination among similarly situated classes in that it provided campaign financing to some but not all presidential candidates. The Court rejected an equal protection challenge to this aspect of the statute.

In testimony on the bill that became the very statute Common Cause attacks in this case, the organization's representative said that the frank

> "justifiably allows Members of Congress to correspond in performance of their official functions . . . with their constituents and others regarding matters before the Congress, the executive and the judiciary . . . . There is a legitimate public interest in Congressmen being able to freely communicate with their constituents on matters of public business." *Use of the Congressional Frank: Hearings on H.R. 3180 Before the Special Ad Hoc Subcommittee of the Committee on the Post Office and Civil Service*, 93d Cong., 1st Sess. 90-91 (1973) (testimony of Fred Wertheimer, Director of Legislation (and now President), Common Cause).

That being so, no challenge can be made to the franking statute in general—although Common Cause purports to challenge the statute "on its face." Instead, the real challenge must be to particular kinds of mailings the statute is said to authorize, which leads us to our next point.

B. The District Court Wisely Left Regulation of The Particular Details of the Use of the Frank In the Hands of Congress.

The district court was careful not to hold that "the franking privilege may never be shown to create such an imbalance in the campaign process as to constitute a cognizable interference with important rights." (J.S. App. 27a) It is only in *this* case, on *this* set of facts (contained in a massive record, *see* J.S. App. 10a & n.10), at the suit of *these* plaintiffs, that the court decided, on both constitutional and prudential grounds, to defer to the actions of Congress in regulating and overseeing the use of the frank by its 535 members.

This was a wise decision with which this Court would plainly agree even if more elaborate briefing and oral argument were ordered.

It is not disputed that the essential question is the way in which one draws the line between lawful and unlawful uses of the frank:

> "They [the plaintiffs] concede that the problem is merely one of drawing lines—striking a proper balance between legitimate and illegitimate uses of the frank." (J.S. App. 21a; *see also Hearings, supra*, at 89-90.)

More precisely, the question is the way in which such a line is drawn in the "middle area" that lies between unchallengeably official mail, on the one hand, and forbidden personal mail, on the other. (J.S. App. 22a-23a) This "middle area" embraces mail that relates to a Member's official duties but that might affect the Member's chances of getting reelected. Many kinds of mail within this "middle area" may be mailed under the frank, while many others may not be. This is both because of the express words of the statute and because of detailed rules and regulations issued over the past several years. For example, a franked congressional newsletter may contain a tabulation of the Member's voting record and a report detailing positions he or she took on legislative proposals[29] (a principle Common Cause supported in the 1973 hearings (*Hearings, supra*, at 91)), but not frankable is a reprint from a national publication which reviewed a Member's record and encouraged political support for him.[30] Also includable are comments critical of administration or congressional policies or activities, but not if they are "presented in a partisan manner."[31] Voter registration information may be mailed under the frank, and recipients of franked mail may be encouraged to register and vote, but neither partisan information nor a picture of the Member may be included in such a mailing,

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[29] *Franking Commission Regulations* at p. 7.

[30] *Id.* at p. 14 n.14.

[31] *Id.* at p. 7.

and a Member may not solicit votes in favor of certain referendum issues in the course of sending voter registration information.[32] Restrictions are placed on the use of a Member's picture in a newsletter, as well as on the use of "personally phrased references."[33] And, as we have pointed out (p. 5, *supra*), all unsolicited mass mailings under the frank—whatever their content—are prohibited during the 60-day periods preceding primary and general elections in which the Member is a candidate.

Concededly, the district court found that franked mailings were sometimes employed as part of incumbents' campaign strategies, particularly in the early years under the 1973 statute. (J.S. App. 12a-13a)[34] But the court also found that these were a distinct minority of franked mailings (*id.* 8a) and that since enactment of the franking statute in 1973 "Congress has tightened considerably the respective features of the 1973 Act" (*id.* 10a). With new rules in 1977, numerous regulations and advisory opinions since then, and an amended statute in 1981, Congress has pursued with vigor the same goal Common Cause seeks—minimizing uses of the frank that are excessively electoral. Congressman Udall's frustration over the difficulty of drawing the perfect line (as quoted in

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[32] *Id.* at p. 12 & n.12; *see* 39 U.S.C. § 3210(a)(3)(H).

[33] *Id.* at 6, 8.

[34] Plaintiffs overstate several of the district court's findings. For instance, the court found that "[a]t least some Members of Congress" during the 1972, 1974 and 1976 campaigns used professional consultants to help integrate franked mailings into their campaign strategies (J.S. App. 13a); plaintiffs omit the qualifying phrase "at least some" and also the dates of the campaigns. (J.S. 4-5) The court also found that "[s]everal Senators and Representatives" have targeted mass mailings in ways that are frequently related to reelection campaigns rather than to official business (J.S. App. 13a); plaintiffs quote this finding six times but each time they omit the qualifying phrase "[s]everal Senators and Representatives" (J.S. 4, 5, 10, 12, 14, 15).

J.S. 14 n.8)—an attitude shared by others [35]—simply reflects the reality that continuous attention to the matter is necessary. As a Senate committee said recently in explaining enactment into statutory law of the 60-day blackout:

> "* * * at some point a Member's primary attention diverts to the process of becoming reelected and away from his representative function. Drawing a line at that point is a question of balance." [36]

Common Cause asked the district court, and now asks this Court, to involve itself deeply in this complex line-drawing activity.[37] Notably, the district court was asked to make a rule, in the name of the Constitution, that

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[35] *See, e.g., Congressional Franking Privileges: Hearing on S. 1224 Before the Subcommittee on Civil Service, Post Office and General Services of the Senate Committee on Governmental Affairs*, 97th Cong., 1st Sess. 2-3 (1981) (testimony of Sen. Wallop, then Chairman of the Senate Select Committee on Ethics). Senator Wallop has more recently expressed similar views in another Senate hearing on the franking privilege, which is ongoing. *Hearing on Senate Mass Mail Before Senate Committee on Rules and Administration*, 98th Cong., 1st Sess. (Feb. 2, 1983).

[36] S. Rep. No. 155, 97th Cong., 1st Sess. 5 (1981).

[37] Plaintiffs also asked the district court (*see* Appendix), and have suggested to this Court (J.S. 17), that all mass mailings under the frank be forbidden. This is of course not line drawing but major surgery—although with an axe. It is not at all apparent how the Constitution could ever be invoked to forbid altogether the mailing by Members of Congress of newsletters under the frank to 500 or more constituents if the newsletters contain nothing which even Common Cause would consider to be electioneering.

One alternative Common Cause suggests is to forbid such mailings by a Member "who has become a candidate for reelection" (J.S. 17)—a suggestion also made at various times in plaintiffs' briefs in the district court. How one defines when that moment has been reached is not at all clear, and indeed some might say that an incumbent is *always* a candidate for reelection. Congress has tried to strike a fair balance on this point by the 60-day blackouts to which we have referred several times, but Common Cause is not satisfied with this (although it has never said why).

whether a particular item could be mailed under the frank must be made to turn on the motivation of the sender rather than merely the content of the item and that a "truly independent body" be established to pass judgment on the motivation issue in particular cases. (J.S. App. 18) Presumably this would mean that, if a Member wished to mail to senior-citizen constituents a newsletter containing his views on why Social Security benefits should not be reduced, the frank could lawfully be used only if the "independent body" were to decide that the Member's motive did not include increasing his attractiveness to those constituents in a future election. As the district court pointed out, however, a Member of Congress may have mixed motives in sending out particular mailings:

> ". . . it is undeniable that Senator X, acting in his elected capacity, should have a right to make mailings within this middle area related to his official duties. It is equally obvious that this same individual acting as candidate for the Senate has an interest in mailing the same material to prospective voters to promote his campaign efforts. Thus the motivations, even behind a particular mailing, may be mixed." (J.S. App. 23a)

In other words, many of the acts of elected officials may be taken with one eye on the next election. Indeed, one could even say that this is how a government of popularly elected representatives should operate:

> "* * * There is no time during a Member's term where his function can be designated purely representative or purely political. In a republic where the people freely choose whom they will elect and where the representatives are responsible to the people, the representative function and the political process are inseparable." S. Rep. No. 155, *supra*, at p. 5.

The district court acted with good sense in declining to enter this particular political thicket. There are many

restrictions contained in the statute and the rules and regulations of the two houses of Congress, and many more result from the continuous process of advising engaged in by the House Franking Commission and the Senate Select Committee on Ethics. Some restrictions may be unnecessary. Some may not be restrictive enough, and they may be tightened up by the legislators themselves. But there is no suitable oversight role for a court on the facts of this case.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Of Counsel:

EDWIN M. ZIMMERMAN
WILLIAM H. ALLEN
VIRGINIA G. WATKIN
MICHAEL J. COURSEY
COVINGTON & BURLING
Washington, D.C.

JOHN VANDERSTAR
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5540
Counsel of Record for House Commission on Congressional Mailing Standards

April 8, 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

NOTICE OF FILING

At the request of the Court at the hearing of September 30, 1981, plaintiffs hereby submit a detailed proposed Order for the Court's consideration.* For the convenience of the Court, plaintiffs also resubmit the proposed Order originally appended to their Motion for Summary Judgment filed on May 22, 1981.

The first Order submitted herewith contains a declaration that the challenged statute violates the First and Fifth Amendments and the General Welfare Clause of the Constitution and enjoins the operation of the frank entirely. It further provides, however, a stay of that

---

* [As corrected by "Errata for Plaintiff's Proposed Order submitted October 23, 1981," filed November 2, 1981.]

injunction for a period of ninety (90) days to permit Congress to enact a new statute in conformity with the Court's opinion.

The second Order submitted today is a more detailed document, as requested by the Court at the September 30 hearing. It does four things. First, it declares the present statute unconstitutional, setting forth in detail the reasons therefor. Second, it enjoins all mass franked mailings. Third, it sets up a certification process for all other franked mailings to ensure that those mailings are used only for legitimate representative functions. Finally, the Order contains a provision for modification in the event that Congress enacts a new statute which does not discriminate unconstitutionally against challengers and their supporters.

Respectfully submitted,

/s/ Kenneth J. Guido, Jr.
KENNETH J. GUIDO, JR.

/s/ Ellen G. Block
ELLEN G. BLOCK

/s/ Donald J. Simon
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-1200
Attorneys for Plaintiffs

Dated: October 23, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

ORDER

This matter having come before the Court on plaintiffs' Motion for Summary Judgment, and the Court being fully advised of the grounds therefor, and having concluded that there is no genuine issue of fact material to be submitted to the Court, and having concluded that plaintiffs are entitled to judgment as a matter of law, it is this ——— day of ———, 1981,

ORDERED that plaintiffs' Motion for Summary Judgment be granted and that final judgment be entered in favor of plaintiffs; and it is further

DECLARED that 39 U.S.C. § 3210 discriminates against candidates challenging incumbent Members of the United States Congress and also discriminates against the supporters of such challengers, in violation of the First and Fifth Amendments and the General Welfare

Clause, Article I, Section 8, of the United States Constitution; and it is further

ORDERED that Defendants Bolger, his agents, employees and all others in active concert with him be and hereby are enjoined from honoring mail franked pursuant to 39 U.S.C. § 3210; and Defendant Regan, his agents, employees and all others in active concert with him be and hereby are enjoined from disbursing funds for the payment of postage for mail franked pursuant to 39 U.S.C. § 3210; and it is further

ORDERED that the operation of this injunction be stayed for a period of ninety days to allow Congress time to enact a new statute in conformity with the Court's opinion.

_____

United States Court of Appeals Judge

_____

United States District Judge

_____

United States District Judge

Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

PROPOSED ORDER

This matter having come before the Court on plaintiffs' Motion for Summary Judgment, and the Court being fully advised of the grounds therefor, and having concluded that there is no genuine issue of material fact to be submitted to the Court, and having concluded that plaintiffs are entitled to judgment as a matter of law, it is this ——— day of ———, 1981,

ORDERED that plaintiffs' Motion for Summary Judgment be granted and that defendants' Motion for Summary Judgment be denied, and that final judgment be entered in favor of plaintiffs; and it is further

DECLARED that 39 U.S.C. § 3210 discriminates against candidates challenging incumbent Members of the United States Congress and also discriminates against the supporters of such challengers, in violation of the First and Fifth Amendments and the General Welfare

Clause, Article I, Section 8, of the United States Constitution. The statute is unconstitutional in that it authorizes the use of franked mail to promote the re-election of Members of Congress, insofar as it:

(a) permits the use of franked mail the contents of which are unrelated to the performance of legitimate representative functions but are, instead, used for the purpose of promoting the Member's re-election;

(b) permits franked mail, which is not in response to specific inquiries, to be sent in great volume and with great frequency;

(c) permits fluctuations in the volume of franked mailings which directly relate to the electoral cycle;

(d) permits the mailing of franked mail to lists of names gathered through campaign activities;

(e) permits the mailing of franked mail as part of a Member's re-election strategy, including *inter alia*, the targeting of franked mail to only those persons identified as likely to respond positively to the subject matter of the mailing or to agree with the views of the Member as expressed therein and not to all persons with an interest in the subject matter, the mailing of franked mail to certain geographical areas or to certain groups based upon the Member's political strength in that area or among that group, or based upon an anticipated favorable reaction to the mailings by recipients in that area or among that group;

(f) permits the inclusion in computers used for franked mailings of demographic and political information about individuals and groups and the inclusion in those computers of names gathered for campaign purposes;

(g) excludes consideration of the context and circumstances under which a franked mailing is made from any judgment as to its frankability. It is further

ORDERED that Defendant Bolger, his agents, employees and all others in active concert with him be and

hereby are enjoined from honoring mail franked pursuant to 39 U.S.C. § 3210, and Defendant Regan, his agents, employees and all others in active concert with him be and hereby are enjoined from disbursing funds for the payment of postage for any mailings made pursuant to 39 U.S.C. § 3210 unless Defendants have received from the Member of Congress who is sending the mail a certification under 18 U.S.C. § 1001, that:

(a) each piece of franked mail either will be sent in response to a specific constituent inquiry or will be limited to discussion of existing law, or pending or proposed federal legislation, federal Executive action, or federal judicial opinions and the Member's positions thereon.

(b) the names and other information collected from constituent responses to franked mailings, including but not limited to questionnaires sent pursuant to 39 U.S.C. § 3210(a)(3)(C), will not be used for subsequent campaign mailings or other campaign activities;

(c) franked mailings will not be paid for, either direct or indirectly, with other than official funds;

(d) franked mailings will not be sent to a segment of the Member's constituency selected on the basis of its probable favorable response to the content of the mailing;

(e) franked mailings will not be sent to persons whose names have been gathered in the course of campaign activities; and

(f) franked mailings will not be a part of a re-election campaign plan. It is further.

ORDERED that Defendants Bolger and Regan, their agents, employees and all others in active concert with them be and hereby are enjoined from honoring or disbursing funds for the payment of postage for all mass mailings made under the frank, as defined in 39 U.S.C. § 3210(a)(5)(D). And it is further

ORDERED that this Order may be modified upon motion of Defendants in the event that Congress amends 39 U.S.C. § 3210 to ensure that it does not discriminate unconstitutionally against challengers to incumbent Members and their supporters.

So ordered.

_____

United States Court of Appeals Judge

_____

United States District Judge

_____

United States District Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Filing and proposed Orders has been served by hand on the individuals listed below, this 23rd day of October, 1981.

John Maclay, Esq.
Room 3341
Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Michael Davidson, Esq.
Office of Senate Legal Counsel
1413 Dirksen Senate Office Building
Washington, D.C. 20510

John Vanderstar, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
Room 919
Washington, D.C. 20044

/s/ Kenneth J. Guido, Jr.
KENNETH J. GUIDO, JR.

No. 82-1141

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMON CAUSE, ET AL., APPELLANTS

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE EXECUTIVE APPELLEES TO AFFIRM

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
MARLEIGH D. DOVER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Congressional Franking Act of 1973, 39 U.S.C. (& Supp. V) 3210, violates appellants' rights to participate in the electoral process, in violation of the First and Fifth Amendments.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1141

COMMON CAUSE, ET AL., APPELLANTS

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

MOTION OF THE EXECUTIVE APPELLEES TO AFFIRM

The Solicitor General, on behalf of the Postmaster General and the Secretary of the Treasury, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-27a) is not reported.

JURISDICTION

The order of the district court granting summary judgment (J.S. App. 28a) was filed on September 7, 1982 and entered on September 8, 1982. A notice of appeal to this Court was filed on Monday, November 8, 1982 (J.S. App. 54a), and the Jurisdictional Statement was filed on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1(a) of the Congressional Franking Act of 1973, 39 U.S.C. (& Supp. V) 3210, and 2 U.S.C. (& Supp. V) 501-502 are set out at J.S. App. 55a-69a.

STATEMENT

1. "Frank" is defined as the facsimile signature of one authorized by statute to transmit matter through the mail without prepayment of postage. 39 U.S.C. 3201. It is a legislative privilege that pre-dates the Constitution. S. Rep. No. 93-461, 93d Cong., 1st Sess. 2 (1973). In 1775 the Continental Congress authorized the use of the frank by its Members. When it established the postal system in 1789, the First Congress retained the privilege for documents and correspondence. S. Rep. No. 97-155, 97th Cong., 1st Sess. 3-4 (1981). Except for a period after the Civil War, the privilege has been in existence throughout our Nation's history. The purpose of the frank, essential to our representative form of government, is to aid the conduct of the official business of Congress by conveying information to and requesting the views of the public. 39 U.S.C. 3210(a)(1) and (2).

The Congressional Franking Act, 39 U.S.C. (& Supp. V) 3210, establishes a franking privilege for all mail matter pertaining to the "official business, activities, and duties of the Congress" (39 U.S.C. 3210(a)(1)). The Act prohibits

transmission as franked matter of anything that "is purely personal to the sender or to any other person and is unrelated to the official business" of Congress. 39 U.S.C. 3210(a)(4). To illustrate these broad definitions, the Act provides examples of both frankable and nonfrankable matter. The former includes newsletters, questionnaires, federal laws and regulations, nonpartisan voter registration and election information, mail directed to other Members of Congress or to other government officials, and congratulations to individuals who have achieved some public distinction. 39 U.S.C. (& Supp. V) 3210(a)(3).

The privilege is expressly withheld from mailings "laudatory and complimentary" of a Member "on a purely personal or political basis," materials soliciting political support or financial assistance, reports of how a Member spends time when not performing his official duties, and holiday greeting cards. 39 U.S.C. (& Supp. V) 3210(a)(5). The statute restricts the size and frequency of pictures of Members included in newsletters and mass mailings (39 U.S.C. 3210(a)(3)(J)), prohibits Members from sending out unsolicited mass mailings (those exceeding 500 pieces) fewer than 60 days before any primary or general election in which they are candidates (39 U.S.C. (Supp. V) 3210(a)(6)), and requires that the cost of mass mailings be defrayed exclusively from appropriated funds and not campaign funds (39 U.S.C. (Supp. V) 3210(f)).

The Act also establishes for the House a special commission—composed of Members—known as the House Commission on Congressional Mailing Standards; in the Senate the Act delegates responsibility to the Select Committee on Standards and Conduct of the Senate.[1] 2 U.S.C. (& Supp.

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[1]S. Res. 4, 95th Cong., 1st Sess. (123 Cong. Rec. 3692 (1977)), changed the name to the Select Committee on Ethics.

V) 501-502. Both bodies are required to "provide guidance, assistance, advice, and counsel, through advisory opinions or consultations, in connection with the mailing or contemplated mailing of franked mail" (2 U.S.C. (Supp. V) 501(d); 2 U.S.C. 502(a)). Before making some kinds of franked mass mailings, Members of the House must submit samples or descriptions to the House Commission. 39 U.S.C. (Supp. V) 3210(d)(6)(A). The Act authorizes the Senate Committee to impose similar requirements. 39 U.S.C. (Supp. V) 3210(d)(6)(B).

Both the House Commission and the Senate Committee are required to "prescribe regulations governing the proper use of the franking privilege" (2 U.S.C. (Supp. V) 501(d); 2 U.S.C. 502(a)). Both have done so. Included among the regulations are prohibitions against references in franked mailings to past or future campaigns, a prominent party label with the Member's picture, news releases announcing filing for reelection, the Member's campaign schedule, and the like.[2] The Act also provides an administrative procedure for dealing with violations. Judicial review of the administrative determination is contemplated. 2 U.S.C. (Supp. V) 501(e); cf. 2 U.S.C. 502(c).

2. Appellants Common Cause and John W. Gardner filed this action in 1973 on behalf of Common Cause's members, who are candidates and voters. By amended

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[2]The latest version of the procedures available in the Senate for counsel and review of questions about the proper use of the frank is contained in Select Committee on Ethics, United States Senate, *Regulations Governing the Use of the Mailing Frank by Members and Officers of the United States Senate* (1979). The House's regulations governing the use of the frank and rules of practice before the Commission are found in *Regulations on the Use of the Congressional Frank by Members of the House of Representatives* (1979).

The authority to promulgate such rules is based both on the Act and on Article I, Section 5 of the Constitution, which authorizes each House to regulate the conduct of its members.

complaint filed in March 1974, they requested a declaratory judgment that 39 U.S.C. 3210 is unconstitutional, an injunction against the operation of the statute, and an order that the defendants inspect franked mail and refuse to honor and pay for it when used for mass mailings and other matters not pertaining to Congress's official business (J.S. App. 44a-45a). Named as defendants were the Postmaster General and the Secretary of the Treasury. The House Commission on Congressional Mailing Standards intervened as a defendant, and the Senate participated as amicus curiae. Appellants argued that free use of the mail by Members of Congress violates their First and Fifth Amendment rights to fair elections by giving incumbents seeking reelection a substantial financial advantage over their opponents.[3]

A three-judge district court was convened pursuant to 28 U.S.C. 2282.[4] After extensive discovery the parties filed cross-motions for summary judgment. Defendants argued that the Act and the congressional rules promulgated under it facilitate necessary communication between Members of Congress and their constituents while preventing illegitimate uses of the frank.[5]

On September 8, 1982, the district court entered judgment for the defendants. The court found that "the franking privilege is a valuable tool in facilitating the performance by

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[3]Appellants also argued that the Congressional Franking Act permits an unlawful use of public funds for a nonpublic purpose in violation of the General Welfare Clause. U.S. Const. Art. I, § 8, cl. 1.

[4]Pub. L. No. 94-381, 90 Stat. 1119, which removed "substantial constitutional questions" from the class of cases to be heard by three-judge district courts, does not apply to actions begun before its enactment on August 12, 1976. See *Rostker* v. *Goldberg*, 453 U.S. 57, 62 n.2 (1981).

[5]The defendants also argued that Common Cause and its members lacked standing to challenge the validity of the Act. The district court rejected this contention (J.S. App. 30a-47a, 49a-53a).

individual Members of Congress of their constitutional duty to communicate with and inform their constituents on public matters" (J.S. App. 11a). It also found that Congress "has recognized the dangers, constitutional as well as practical, of extending the franking privilege to [unofficial] mailings and has excluded them or expressly prohibited them under the statute and rules in both Houses" (*id.* at 22a). The court further noted that the evidence showed no relationship between the use of the frank and the outcome of an election (*id.* at 14a, 22a). While it recognized that the franking privilege could conceivably so unbalance the campaign process as to interfere with constitutional rights, the court nevertheless concluded that "the level of impact has not been shown to be sufficient in this case * * * to * * * [warrant] redrafting" the Act (*id.* at 27a).

ARGUMENT

Although the Jurisdictional Statement gives a different impression, the franking privilege is not a form of election funding. Cf. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Its function is rather to promote communication between government and the people. For that reason it is necessarily granted to members of Congress, and appropriately limited by statute to "the official business, activities, and duties of the Congress" (39 U.S.C. 3210(a)(1)). Appellants have conceded both the necessity and the propriety of those aspects of the franking statute (J.S. App. 21a).

Appellants nevertheless argue that the Congressional Franking Act, because it sweeps near the electoral process at some points in its orbit, must be viewed with the strictest scrutiny. So viewed, they contend, the Act is unconstitutional on its face, since it could do more than it does to prevent the possibility of benefit to incumbents. In lieu of the measures Congress has taken to avoid that danger, they propose (J.S. 15, 18) that this Court forbid Members of

Congress to communicate with their constituents by franked mail if the "purpose or primary effect" of the communication is to advance an incumbent's campaign for reelection.

These contentions are without merit. The proper question is simply whether the lines drawn in the Act are reasonable ones. They are clearly so; indeed, they are far preferable to those proposed by appellants. There is no need for plenary review of the district court's decision, which correctly states those obvious points.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CONGRESSIONAL FRANKING ACT IS CONSTITUTIONAL BECAUSE IT INCLUDES REASONABLE SAFEGUARDS AGAINST IMPROPER INFLUENCE ON THE ELECTORAL PROCESS

Appellants contend (J.S. 6-12) that the district court's decision is inconsistent with settled constitutional principles because it declined to apply a standard of strict scrutiny in examining the Act's effect on the electoral process. But this Court's decisions interpreting the First and Fifth Amendments unequivocally demonstrate the correctness of the district court's conclusion—that the Act includes reasonable, and hence constitutional, safeguards against improper influence on the electoral process. Accordingly, the district court correctly held that the Congressional Franking Act is not unconstitutional on its face. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455 (1977).

1. It is a remarkable—indeed fatal—commentary on appellants' argument for strict scrutiny that virtually *every* decision by this Court adduced in support of it has dealt

with: (i) governmentally imposed *restrictions* on the exercise or effectiveness of the franchise;[6] (ii) governmentally imposed *restrictions* on access to the ballot;[7] or (iii) governmentally imposed *restrictions* on (or penalties for) the exercise of freedom of speech or political association.[8] *Buckley* v. *Valeo, supra*, the one notable exception from that litany, explains succinctly why none of those cases is relevant here (424 U.S. at 93-94; emphasis added):

> In several situations concerning the electoral process, the principle has been developed that *restrictions* on access to the electoral process must survive exacting scrutiny * * * These cases, however, dealt primarily

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[6] *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969)(New York law limiting entitlement to vote in school district elections); *Baker* v. *Carr*, 369 U.S. 186 (1962) (malapportionment of Tennessee General Assembly); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (malapportionment of Alabama legislature).

[7] *Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173 (1979) (signatures required for new parties and independent candidates to get on the ballot in Chicago elections); *Storer* v. *Brown*, 415 U.S. 724 (1974) (California's one-year disaffiliation provision for independents seeking ballot position); *Bullock* v. *Carter*, 405 U.S. 134 (1972) (fees as high as $8900 to get on Texas primary ballot); *Williams* v. *Rhodes*, 393 U.S. 23 (1968) (signatures required by Ohio for third-party candidates seeking a place on presidential ballot).

[8] *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978) (Massachusetts law forbidding corporate expenditures to influence vote on referendum proposals); *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) (ordinance forbidding door-to-door solicitation of contributions by some charitable organizations); *Police Department* v. *Mosley*, 408 U.S. 92 (1972) (ordinance forbidding nonlabor picketing near school buildings); *United States* v. *Robel*, 389 U.S. 258 (1967) (Subversive Activities Control Act provision forbidding Communist-action organization members to work at defense facilities); *Branti* v. *Finkel*, 445 U.S. 507 (1980) (patronage discharge of assistant public defenders); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (patronage discharge of process servers, bailiff, and security guard).

> with * * * direct burdens not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues. In contrast, *the denial of public financing to some * * * candidates is not restrictive of voters' rights and less restrictive of candidates'.*

The difference in treatment between actual restrictions on First Amendment rights and the expenditure of public funds rests on several principles. The first is that the government collects and spends vast sums of money, and it is simply not possible—without unacceptable disruption—to prohibit every expenditure that has secondary effects on how people may vote.[9] The action of government in the latter situation thus comes with a momentum for respect lacking in the case of actual restrictions. The second is that however real such secondary effects may be, they nevertheless do not call for the same serious concern appropriate to actual restrictions on the exercise of constitutionally protected freedoms.[10] And only "[w]hen a statutory classification *significantly* interferes with the exercise of a fundamental right" is strict scrutiny appropriate. Compare *Zablocki* v. *Redhail*, 434 U.S. 374, 388 (1978) (emphasis added), with *Califano* v. *Jobst*, 434 U.S. 47, 53-54 (1977).

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[9]As the district court pointed out, an incumbent simply by virtue of his role as a Member of Congress "has * * * offices in his home district, in addition to his Washington office; he has a staff paid out of public funds; he has a WATS line for telephone calls which he may use to communicate with his constituents" (J.S. App. 24a).

[10]See, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297, 315-318, 321-322 (1980); *Maher* v. *Roe*, 432 U.S. 464, 475-476 (1977); *American Party* v. *White*, 415 U.S. 767, 793-794 (1974); *Johnson* v. *Robison*, 415 U.S. 361, 375 n.14, 385 (1974); *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959). Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40-41 (1973).

Appellants' First Amendment claim for strict scrutiny "fares no better in equal protection garb." *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (Feb. 23, 1983), slip op. 16. Congress's action is entitled to no less deference, and the impact on fundamental rights is no more significant, when viewed through another lens. Nor does the Act affect any suspect class. It simply distinguishes Members of Congress from everyone else, because only Members of Congress need to communicate with their constituents about the business of government. The relevant question is thus whether what Congress has done "rationally furthers some legitimate, articulated * * * purpose and therefore does not constitute an invidious discrimination * * *." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1. 17 (1973).

The conclusion that strict scrutiny is inapplicable to government support for congressional communications with constituents follows inexorably from this Court's recent decision in *Perry Education Association* v. *Perry Local Educators' Association, supra.* In that case, a collective bargaining agreement giving a teachers' union exclusive access to the interschool mail system was challenged by a rival union. The rival union was concerned that " 'teachers inevitably will receive from [their union] self-laudatory descriptions of its activities on their behalf' " (slip op. 11) (Brennan, J., dissenting). The Court concluded that (slip op. 11-14; footnotes omitted):

> [t]he touchstone for evaluating the[] distinction[] is whether [it is] reasonable in light of the purpose which the forum at issue serves.
>
> * * * * *
>
> The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the district's legitimate interest * * *. Use of school mail

facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes.

Indeed, this case is less troubling than *Perry Education Association* for several reasons. In the first place, there was in that case no rule "expressly limiting the [union's] use of the system to messages relating to its official duties" (slip op. 13) (Brennan, J., dissenting). The Congressional Franking Act, by contrast, includes just such a limitation. 39 U.S.C. 3210(a)(4). More important, the rival union in *Perry Education Association* was "explicitly denied access to the mail system" (slip op. 11) (Brennan, J., dissenting). Here, on the other hand, rival candidates have no restrictions placed on their ability to use the mails. See *United States Postal Service* v. *Greenburgh Civic Associations*, 453 U.S. 114, 127 (1981).

2. Despite appellants' repeated reference to mass mailings that "have no relationship to official business" (J.S. 4, 5, 10, 12, 14, 15),[11] this case has nothing to do with such uses of the frank. Appellants have challenged the validity of the Congressional Franking Act on its face (J.S. App. 36a, 41a-42a, 50a), and the Act specifically proscribes use of the frank for matters "unrelated to * * * official business, activities, and duties" (39 U.S.C. 3210(a)(4)). Instead, what is involved are mailings that necessarily further the constitutional work of Congress, but that at the same time have the unavoidable (and perhaps desired) effect of influencing

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[11] Appellants in each case omit the district court's qualifying phrase: "Several Senators and Representatives have targeted franked mass mailings in ways that frequently have no relationship to official business" (J.S. App. 13a).

voters' perception of the incumbent. Thus, the decision about how to regulate such mail must inevitably strike a balance between restricting the channels of communication open to Congress and avoiding influence on electoral contests. In striking that balance, unusual deference is due to Congress's own determination about its needs to correspond with and request information from its constituents. Appellants in fact "concede that the problem is merely one of drawing lines" (J.S. App. 21a). That being so, there is no warrant for judicial rewriting of the Act unless the lines Congress has drawn to prevent abuse of the privilege are irrational.

The Act states that the frank may not be used for matter "unrelated to * * * official business, activities, and duties" (39 U.S.C. 3210(a)(4)). This provision guarantees that every franked communication, whatever its impact on voters, carries out in some way the work that the Constitution assigns to Congress. The Act also forbids any unsolicited mass mailing within two months of any primary or general election if the member is a candidate (39 U.S.C. (Supp. V) 3210(a)(6)(A)(i), and (C)), and forbids at all times the solicitation of political support, votes, or financial assistance (39 U.S.C. (Supp. V) 3210(a)(5)(C)). It creates watchdogs in both Houses of Congress to police compliance through issuance of appropriate regulations, prior review of mailings, and investigation and sanctioning of violations (2 U.S.C. (& Supp. V) 501-502). Finally, it contemplates judicial review (2 U.S.C. (Supp. V) 501(e)) and civil actions (2 U.S.C. 502(c)) as outside checks on enforcement. There may be other ways of approaching the problem, but the one chosen is certainly not irrational. "Congress was not obliged to select instead from among appellants' suggested alternatives." *Buckley* v. *Valeo, supra*, 424 U.S. at 100.

II. APPELLANTS' PROPOSED REVISIONS OF THE CONGRESSIONAL FRANKING ACT WOULD SERIOUSLY INTRUDE ON THE FUNCTIONS OF CONGRESS, AND PRODUCE LITTLE CORRESPONDING BENEFIT

Appellants object to several kinds of communication permitted by the balance Congress struck in the Act. They suggest "[f]irst, and most important, [that] Congress * * * deny use of the frank for mass mailings" (J.S. 17). They also argue that the frank should be denied for certain material on account of its content—*e.g.*, material laudatory of the incumbent, and questionnaires that "obtain demographic and other information helpful to identifying recipients for targeted mailings" (*id.* at 14, 17). Third, they claim that regardless of the content of a communication, it should not be sent free to lists of addresses compiled in certain ways—*e.g.*, "names maintained in a computer file which are accompanied by party designation" (*id.* at 17). The "governing principle" they propose is that the frank may not be used for any "mailing whose purpose or primary effect, judging by the content in light of the circumstances, is the advancement of the incumbent's campaign for reelection. Cf. *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963); *Widmar* v. *Vincent*," 454 U.S. 263 (1981) (J.S. 15); see also J.S. 18 ("unconstitutional * * * if the purpose or primary effect * * * is to promote his reelection").

That analogy to the Establishment Clause, however, is "patently inapplicable" to this case. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 92. In the first place (*id.* at 93 n.127),

> [t]he historical bases of the Religion and Speech Clauses are markedly different. * * * [R]eligious worship * * * must be strictly protected from government intervention. * * * But the central purpose of the

> Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive * * *. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech * * *.

Thus, while the Establishment Clause guards against the one risk of blending religion and government, in this case there are risks on both sides: the danger of curtailing communication of fundamental importance to both Congress and citizen, and the danger of government-funded electioneering.

In the second place, even if it were desirable to strike the balance differently than Congress has, it is impossible to erect a "wall of separation" between representative and political functions.

> There is no time during a Member's term where his function can be designated purely representative or purely political. In a republic where the people freely choose whom they will elect and where the representatives are responsible to the people, the representative function and the political process are inseparable. Yet * * * the free flow of information from representative to constituent is fundamental to representative government. Hence legislation limiting that flow must be drawn in the narrowest of terms.

S. Rep. No. 97-155, *supra*, at 5.

In the third place, the restrictions advanced by appellants would entail considerable disruption for the work of Congress. The current statutory test determines frankability by asking an objective question: What is "the type and content of the mail sent[?]" 39 U.S.C. (Supp. V) 3210(e). Appellants'

emphasis on the purpose of a communication, by contrast, would require "probing into the deepest thoughts and motives of an individual Member of Congress" (J.S. App. 24a). As this Court has emphasized in a related context, "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508 (1975). To demand in addition what appellants ask—an examination of "the size of the mailing; the timing of the mailing in relation to the incumbent's declaration of candidacy or the date of the primary or general election; whether the list of addressees has been compiled for campaign purposes, came from a political party, or was based upon party affiliation; and whether the mailing was targeted in ways bearing no relation to official business" (J.S. 15; footnote omitted)—would frequently make the cost of communication unacceptably high. The chill on congressional communication is, moreover, unlike the restrictions imposed on Congress by the Establishment Clause, for in this case " '*the citizens have a right* to expect information, not only of the acts of Government, but also the principles upon which they were grounded.' " S. Rep. No. 97-155, *supra*, at 4 (emphasis added), quoting 3 Annals of Cong. 277 (1791).

In contrast to the draconian measures advanced by appellants, the balance struck by Congress in the Act sensibly accommodates the competing interests. Consider, for example, appellants' central concern—the use of mass mailings (J.S. 17; J.S. App. 41a). Presumably because of the "primary effect" (or forbidden purpose) such mailings may have, appellants make the remarkable suggestion that Members of Congress should be forbidden to send letters to more than 500 of their constituents at once. They would make it impossible for a Senator to mail more than a handful of his

constituents an explanation of how he stood on Social Security reform or a nuclear freeze—matters of concern to large numbers of them.

The Act, on the other hand, forbids such mailings within two months of elections (39 U.S.C. (Supp. V) 3210(a)(6)(A) and (C)), and also forbids mass mailing of any matter paid for from campaign funds (39 U.S.C. (Supp. V) 3210(f)). It further directs the Senate Committee and House Commission to prescribe rules limiting the number of mailings using the postal patron form of address (39 U.S.C. (Supp. V) 3210(d)(5)). The House Commission pursuant to statutory direction (39 U.S.C. (Supp. V) 3210(d)(6)(A)) has adopted regulations requiring advance review of any such mass mailings. House Rule XLVI, 97th Cong., 2d Sess. The Senate requires registration of all mass mailings with the Secretary of the Senate, and public disclosure of the matter mailed and the groups to which it was sent. Select Committee on Ethics, United States Senate, *Regulations Governing the Use of the Mailing Frank by Members and Officers of The United States Senate* 14-15 (1979).

A second category of mailings that appellants would forbid regardless of content are those sent to "lists of addressees whose identity or selection marks the mailing as political" (J.S. 17). One who compiled a list of his constituents over age 65 "in the course of a political campaign" (*ibid.*) would thus be precluded from sending those individuals his views on Medicare or the Age Discrimination in Employment Act. So too, "persons who are currently outside a Congressman's district but who, because of reapportionment, will be eligible to vote in the District" (*ibid.*) would be disqualified from hearing the views of the one person in Congress they are best able to influence. The Act, by contrast, forbids a Congressman to send mass mailings outside his congressional district if he is a candidate for

some *other* office—a situation where the use of the frank would do far less to promote the business of the House. 39 U.S.C. (Supp. V) 3210(a)(6)(A)(ii)(I). It also specifically bars franked mail soliciting "political support * * * or a vote or financial assistance for any candidate for any public office" (39 U.S.C. (Supp. V) 3210(a)(5)(C)).

Appellants' objections to various kinds of mailings on the basis of their content are at best insignificant. They complain, for example, that the frank is available for "material laudatory of the Member," and for "material conveying congratulations to constituents or reporting on awards or honors won by them" (J.S. 17). But the Act specifically prohibits "mail matter * * * laudatory * * * of any Member * * * on a purely personal or political basis rather than on the basis of performance of official duties" (39 U.S.C. 3210(a)(5)(A)). The 1981 amendment to the Act also eliminates "authority to frank mail matter which consists solely of * * * congratulations for a personal distinction." It remains permissible to send "congratulations for distinctions of a public nature" such as election or appointment to public office, since "[i]n such cases, there is a legitimate legislative reason for making such contracts at public expense." S. Rep. No. 97-155, *supra*, at 6; 39 U.S.C. (Supp. V) 3210(a)(3)(F).

CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
MARLEIGH D. DOVER
Attorneys

APRIL 1983

DOJ-1983-04

No. 82-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMON CAUSE, *et al.*,
Appellants,

v.

WILLIAM F. BOLGER, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

APPELLANTS' RESPONSE TO MOTIONS TO AFFIRM

ARCHIBALD COX *
ELLEN G. BLOCK
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200
Attorneys for Appellants

* *Counsel of Record*

Of Counsel:

PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

April 22, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPELLANTS' RESPONSE TO MOTIONS TO AFFIRM

On April 8, 1983, the Government and House Appellees filed separate motions to affirm the district court's dismissal of Common Cause's challenge to the constitutionality of the congressional franking statute. The motions raise several discreet issues which may bear on the Court's resolution of the jurisdictional question. Accordingly, Appellants file this brief memorandum in response.

THE APPEAL WAS TIMELY FILED

The appeal in this case was taken within sixty days of the judgment of the district court, in accordance with 28 U.S.C. § 2101(b). The district court had signed an

order on September 2, 1982 and "filed" it with the clerk on September 7, 1982. The clerk of the district court entered that order on September 8. Under Rule 58, Federal Rules of Civil Procedure, the district court judgment became effective at the time of its entry on September 8, 1982. Since the sixtieth day from that date fell on Sunday, November 7, Common Cause's November 8 notice of appeal was timely filed. *See* Sup. Ct. R. 29.1.

Burns v. *Richardson*, 384 U.S. 73 (1966) squarely supports this conclusion. Although the order there was announced more than sixty days prior to the notice of appeal, this Court upheld the timeliness of that appeal because the order was entered within the sixty day period. "Whether judged by the date of entry [citing Rule 58, Fed. R. Civ. P.] or by the fact that the order incorporated in the decision of February 17 [was reiterated in a subsequent order], the appeals from the decision announced February 17 were timely." 484 U.S. at 83 n.11. Plainly the Court treated the date upon which judgment was entered as the earliest possible time to start the running of the time for appeal.

No significance can be attributed to the fact that 28 U.S.C. § 2101(b) differs from other statutes and rules governing appeals and, indeed, from virtually all of its own statutory predecessors.[1] As Professor Moore points out, the statute's silence with respect to the entry of the judgment was inadvertent and does not reflect a congressional intent to prescribe a unique method for calculating

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[1] This statute, enacted as part of a revision and codification of the Judicial Code, Act of June 25, 1948, 62 Stat. 961, replaced four other provisions. *See* 28 U.S.C.A. § 2101, Reviser's Note: 1948 Act. Three of those predecessors used the entry of judgment as the point from which time to appeal runs. 28 U.S.C. § 47a (1940 ed.); 15 U.S.C. § 29 (1940 ed.); 49 U.S.C. § 45 (1940 ed.). There is no indication of any legislative intent to alter the operation of these provisions, despite the adoption of the language of the remaining predecessor, 28 U.S.C. § 47 (1940 ed.), with its bare reference to the date of the order appealed from.

the time for appeal. In any event, Professor Moore notes, the error is rendered "harmless" by Rule 58. 6A J. Moore, Federal Practice ¶ 58.05[2], p. 58-233 n.2 (1982).

THE QUESTION IS SUBSTANTIAL

1. The Appellees' submission that this case is not worthy of plenary review flows from their misperception of the nature of the case, a misperception epitomized by the Government's assertion (at p. 11 of its Motion) that this case has nothing to do with "mass mailings that 'have no relationship to official business.'" The Government quotes these words as if they came from our Jurisdictional Statement. In fact, they come from the findings made by the district court describing the legislation and the practices whose constitutionality is in question here:

> Several Senators and Representatives have targeted franked mailings in ways that frequently have no relationship to official business and which are closely connected to reelection plans and strategy.
>
> Opinion below at p. 13a of the Appendices to the Jurisdictional Statement; hereinafter C.C. App. —.

The Government also ignores other critically important district court findings of fact. Nowhere does it mention the court's general conclusion that the franking statute "confers a substantial [financial] advantage to incumbent Congressional candidates over their challengers." (C.C. App. 14a). Nor does its Motion mention the district court's findings regarding how this advantage is achieved —through the use of self-laudatory material, through the use of questionnaires designed to elicit politically useful information about constituents, through the use of targeted mass mailings "which are closely connected to reelection plans and strategy", and through timing franked mass mailings to accommodate the electoral cycle. (C.C. App. 13a-14a).

Finally, the Government disregards the district court's conclusions that these campaign uses of the frank have

been encouraged by, among others, the Chairman of the Appellee House Commission and sponsor of both the 1973 Franking Act and its 1981 amendments. (C.C. App. 12a), that these uses of the frank have been "specifically approved" by the House Commission and duly registered with the Secretary of the Senate (C.C. App. 13a-14a), and that Congress was mindful of the potential for these uses of the frank when it passed the Act. (C.C. App. 14a).

When these facts are taken into account, it is evident that the case involves the issues set forth in our Jurisdictional Statement and warrants plenary consideration by this Court.

2. After Common Cause filed its Jurisdictional Statement in early January, this Court decided *Perry Education Association* v. *Perry Local Educators' Association*, 51 U.S.L.W. 4165 (U.S. February 23, 1983). Appellees' reliance on that case is misplaced.

Perry involved a challenge by a teacher's union to a school board's policy of granting a rival union exclusive access to teachers through an in-house mail system; that right was granted to the favored union after it secured recognition under state law as the exclusive bargaining agent of the teachers. The Court examined the restriction under the line of cases dealing with access to public forums and upheld it against a First Amendment challenge.

For a variety of reasons, the *Perry* case has no bearing on the case presented for review here. First, the result in *Perry* followed from the Court's conclusion that the school mail system was not a public forum to which all speakers had to be given access in an even-handed manner. Access to a public forum is not at issue in this case, which involves the permissibility of a substantial government subsidy to the campaigns of incumbent

Senators and Representatives seeking reelection. (C.C. App. 14a).[2]

Second, central to the *Perry* decision was the fact that favored union's access to the mail system was limited to official business, and the Court explicitly declined to state how it would have ruled if the facts had proven otherwise. 51 U.S.L.W. at 4169-70 n.13. In this case, by contrast, there is "convincing" evidence of political use of the frank which the district court found to be "widespread," "substantial," and indeed *authorized* by the statute. (C.C. App. 12a-14a).

Finally, although it is obviously important, the interest in fair competition among rival labor representatives cannot be compared with the interest in fair competition among rival candidates for national political office. Congressional elections implicate fundamental rights at the heart of representative democracy; union elections do not. Accordingly, the Court's decision in *Perry* is not controlling in this case, and does not provide a basis for summary affirmance of the district court's judgment.

3. Far from relying upon the Establishment Clause of the First Amendment for this challenge to the franking statute, as the Government apparently believes (Motion at pp. 13-14), we allude to the operative test under that Clause merely by way of analogy. It is our point, set forth at p. 15 of the Jurisdictional Statement, that the constitutionality of the franking statue should be governed by the test of whether any uses of the frank permitted by it have the purpose or primary effect of promoting the election of the incumbent Congressman

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[2] Although extending the franking privilege to challengers in congressional elections would be one way to remedy the discriminatory effects of the current statute, *see* Jurisdictional Statement at p. 17, Common Cause has never suggested that this remedy is constitutionally compelled.

or Senator. We refer to the Establishment Clause and relevant cases for the sole purpose of demonstrating the practicability of such a test by reference to its use in another context.

4. The Government's attempt (Motion at p. 15) to present the issue before the Court as a choice between the present legislation and what it describes as "draconian" measures suggested by Common Cause is quite beside the point. The only question presented here is whether the present statute is constitutional. In our Jurisdictional Statement, we suggested alternative franking statutes that Congress might wish to adopt—*not that the Court should order.* Our sole purpose in doing this was to show that the task of separating the proper from the improper uses of the frank does not present a problem which is insoluble by Congress. *See* Jurisdictional Statement at p. 18.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted and the case set down for plenary consideration.

Respectfully submitted,

ARCHIBALD COX *
ELLEN G. BLOCK
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200
Attorneys for Appellants
* *Counsel of Record*

Of Counsel:
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

April 22, 1983